UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

BAUER'S INTELLIGENT TRANSPORTATION, INC.

and **Cases 20–CA–160321**
20–CA–161534
ROY FLUGENCE, AN INDIVIDUAL **20–CA–167627**

and

TEAMSTERS LOCAL 665, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Marta Novoa, Esq. and *Cecily Vix, Esq.*,
for the General Counsel.

Michael G. Pedhirney, Esq. and Alexis A. Sohrakoff, Esq.,
(Littler Mendelson, P.C.) for the Respondent/Employer.

Andrew H. Baker, Esq. (Beeson, Tayer & Bodine, APC),
for the Charging Party/Petitioner.

DECISION

I. STATEMENT OF THE CASE

A. Procedural History

ARIEL L. SOTOLONGO, Administrative Law Judge. On December 30, 2015, the Regional Director for Region 20 of the Board issued a consolidated complaint in cases 20–CA–160321 and 20–CA–161534 ("Complaint I"), alleging that Bauer's Intelligent Transportation, Inc. ("Respondent" or Employer") had violated Section 8(a)(1), (3), and (4) of the Act by engaging in certain coercive or threatening conduct, and by suspending and then discharging its employee Roy Flugence (the Charging Party in case 20–CA–160321). On December 31, 2015 the Regional Director for Region 20 issued a Decision on Objections and Order Consolidating Cases for Hearing directing that certain objections to the election filed by Teamsters Local 665, International Brotherhood of Teamsters ("Union" or "Petitioner") in case 20–RC–150089 be consolidated for hearing with the unfair labor practice cases in Complaint I. Thereafter, on February 2, 2016, the Acting Regional Director for Region 20 issued another complaint in case 20–CA–167627 ("Complaint II"), further alleging that Respondent had violated Section 8(a)(3)

and (1) of the Act by suspending and then transferring its employee Guillermo Vargas to a less desirable and less lucrative location. On the same date, the Acting Regional Director issued an Order consolidating all of the above-referenced cases for hearing. Finally, on February 5, 2015, the Regional Director amended Complaint I, which had initially been issued on December 30, 2015. Respondent filed timely answers to the above-referenced complaints, in essence denying the substance of most of the allegations. I presided over this case in San Francisco, California, from February 16 through 23, 2016.

Thereafter, on September 28, 2016, the Charging Party/Petitioner Union filed a motion to withdraw its objections in case 20–RC–150089. On the same day, the Union separately filed a motion to withdraw the unfair labor practice charges in cases 20–CA–161534 and 20–CA–167627, pursuant to a settlement agreement it had reached with Respondent.[1] I granted the motion to withdraw the objections in case 20–RC–150089, ordered the case severed from the unfair labor practice cases referenced above, and remanded the case to the Regional Director for further processing as the Director found appropriate. Thereafter, on October 3, 2016, the General Counsel filed a brief in opposition to the Union's motion to withdraw the above-referenced charges, and on the following day Respondent filed a brief in support of the Union's motion. Below, I will first discuss the motion to withdraw the charges in cases 20–CA–161534 and 20–CA–167627, inasmuch my decision regarding said motion will have a significant impact on the rest of my decision in these matters.

B. The Union's Motion to Withdraw Cases 20–CA–161534 and 20–CA–167627

As briefly described above, on September 28, 2016, about 7 months after the hearing in these cases had closed, the Union filed its motion to withdraw the above-referenced charges. In order to provide context to these events, at my request, the General Counsel, Union, and Respondent, on November 8, 2016, agreed to the following stipulated facts:

1. Respondent recognized the Union on September 9, 2016;
2. Respondent and the Union entered into a collective-bargaining agreement on September 27, 2016;
3. Representatives of the Union were allowed to meet and talk with bargaining unit employees in San Francisco on September 7, 2016 and in San Jose on September 8, 2016. Respondent scheduled both meetings;
4. Guillermo Vargas was transferred from the San Francisco facility to the Santa Clara facility on March 1, 2016.[2]

[1] As discussed in more detail below, the Union's motion was the result of a settlement agreement reached with the Employer, pursuant to which the Employer recognized the Union as the collective-bargaining representative of the employees in the bargaining unit following a card check, followed by the parties entering into a collective bargaining agreement.

[2] I admit the parties' 11/8/16 Stipulations as Joint Exhibit (Jt. Exh.) 5. As more thoroughly discussed below, Complaint II (in Case 20–CA–167627) alleges that Respondent transferred Vargas to its San Francisco facility in October 2015 for discriminatory and unlawful reasons. The General Counsel alleges that such transfer not only resulted in Vargas losing wages, but also significantly increased Vargas' commuting distance, resulting in additional expenses. The General Counsel has submitted a statement, also at my request, indicating that Vargas, as the result of his transfer to San Francisco, thus incurred losses of $11,894. The statement also indicates that while Vargas is

Given the above stipulated facts and other underlying information, I make the following observations and reach the conclusions discussed below. First, I note that the Board has long encouraged and supported non-Board settlement agreements by litigants, provided certain norms are followed and requirements met. As recently reaffirmed by the Board in its decision in *Postal Service*, 364 NLRB No. 116 (2016), in determining whether it is appropriate to approve such settlement agreements, the test to apply is set forth in *Independent Stave Co.*, 287 NLRB 740 (1987). Under *Independent Stave,* the Board considers all the circumstances surrounding a settlement agreement, including: (1) whether the charging party, the respondent, and any of the individual discriminatees have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of unlawful conduct or has breached previous settlement agreements resolving unfair labor practice disputes. 287 NLRB at 743.

As mentioned above, as part of their agreement, the Respondent Employer agreed to recognize the Charging Party Union as the collective bargaining representative of a certain unit of its employees, and shortly thereafter the Union and Employer entered into a collective-bargaining agreement. As part of this arrangement, the Union agreed to withdraw the charges it had filed with the Board, charges which underpin many of the allegations in the consolidated complaints.[3] Turning to the first criteria under *Independent Stave*, the General Counsel opposes the withdrawal of the charges on various grounds, which I will discuss below. In discussing the General Counsel's opposition, I am cognizant that its opposition is a significant factor weighing against its acceptance. See, e.g., *Clark Distribution Systems,* 336 NLRB 747, 750 (2001); *Iron Workers Local 27,* 313 NLRB 215, 217 (1993). First, the General Counsel notes that there is a separate, independent, charge in case 20–CA–160321 filed by individual Charging Party Flugence, which alleges that he was unlawfully suspended and discharged by Respondent in violation of Section 8(a)(3) and (4) of the Act. Although this charge was not, and could not be, withdrawn by the Union, the General Counsel argues that most, if not all, of the evidence of animus that would support its theories of a violation in Case 20–CA–160321 (which alleges the suspension and discharge of Flugence) as well as 20–CA–167627 (which alleges Vargas' transfer) is demonstrated by Respondent's conduct as alleged in the charges being withdrawn by the Union.[4] Thus, the General Counsel argues that approving the withdrawal of these charges would undermine its allegations with regard to

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pleased that the Union has been recognized and there is a collective bargaining agreement in place, he is opposed to the withdrawal of the charge in Case 20–CA–1167627 because the settlement between the Union and Respondent provides no remedy for his losses.

[3] It is thus important to recognize that the General Counsel has expressed no opposition to the part of the settlement reached by Respondent and the Union that resulted in recognition of the Union and the signing of a collective bargaining agreement. The General Counsel has only expressed opposition to the withdrawal of the charges as the result of such agreement.

[4] I note that the initial charge filed by the Union in Case 20–CA–161534 on October 7, 2015, only alleged that Flugence had been suspended and discharged. This charge is virtually identical to the charge in case 20–CA–160321 filed by Flugence himself on September 18, 2015, and is thus redundant. The Union later filed amended charges in Case 20–CA–161534 on November 10 and 23, 2015, adding multiple allegations of threatening or coercive conduct by Respondent, conduct which would arguably form the basis for finding animus if this conduct is found to have occurred.

Flugence and Vargas, because there would be no record evidence of animus to support its theory of a violation under a *Wright Line* analysis.[5] This argument lacks merit. The Board has held that a finding of animus is not dependent on a finding of an independent violation under Section 8(a)(1). Thus, conduct which exhibits animus but which is not independently alleged or found to violate the Act may nevertheless be used to shed light on the motive for other conduct that is alleged to be unlawful. See, e.g., *Brink's, Inc.*, 360 NLRB No. 136, slip op. at 1, fn. 3 (2014), and cases cited therein. Accordingly, if I approve the withdrawal of the charge in case 20–CA–161534 as the result of the settlement agreement, I can nevertheless discuss the conduct alleged in that charge for purposes of establishing the existence or absence of animus, even if I reach no conclusions or make no findings as to whether such conduct violated the Act.

Turning to the second criteria under *Independent Stave*, the General Counsel argues that the settlement agreement reached by the Union and Respondent is not reasonable under the circumstances because it provides no remedy for Flugence and Vargas. As described above, however, Flugence filed his own charge in Case 20–CA–160321, and that charge is not being withdrawn, so the lawfulness of his suspension and discharge will be discussed and ruled upon in this decision. Accordingly, the allegations in Case 20–CA–161534 as they relate to Flugence are redundant and unnecessary.[6] On the other hand, the General Counsel's argument with respect to Vargas has merit. As described above, Vargas has indicated that he is not satisfied with the settlement between the Union and Respondent, because it does not address or provide a remedy for the alleged monetary losses he incurred as a result of his transfer to the San Francisco yard. Accordingly, I do *not* approve the withdrawal of the charge in Case 20–CA–167627, which will be fully addressed below. Thus, the remainder of this discussion regarding the propriety of approving the withdrawal of the charge(s) will only refer to the withdrawal of Case 20–CA–161534. In this regard, the General Counsel also opposes the withdrawal of the charge because there is no provision for a "notice" to employees informing them that their rights, and the public interest, have been vindicated, and that they are free to exercise their statutory rights without interference from their employer. The General Counsel's argument implies that any settlement that does not require a Board notice or facsimile thereof is inherently deficient, because there is no remedy for the alleged threatening or coercive conduct by the employer. This argument, however, is contrary to the Board's explicit language in *Postal Service*, supra., slip op. at 2, in which it stated:

> It is deference to the charging party's judgment concerning its own interests in accepting less than a full remedy, together with the well-established policy favoring private dispute resolution, that justifies compromising the Board's remedial standards in approving a non-Board settlement. As the Board observed in *Independent Stave*, "[w]hen we reject the parties' non-Board settlement simply because it does not mirror a full remedy, we are consequently compelling the parties to take the very risks that they have decided to avoid, as well as depriving them of the opportunity to reach an early restoration of industrial peace, which after all is a fundamental aim of the Act." Id.

[5] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management, Inc.*, 462 U.S. 393 (1983).

[6] Indeed, the charge in Case 20–CA–160321 filed by Flugence is more comprehensive, inasmuch it alleges not only a violation of Sec. 8(a)(3) of the Act, but also Sec. 8(a)(4), which the charge in Case 20–CA–161534 filed by the Union does not.

Moreover, the General Counsel appears to ignore the importance of what the parties have achieved in this instance, as it relates to the vindication of employee rights. It has often been said, for example, that an employee who has been reinstated to work pursuant to a Board order is a "walking notice," because of the message that such an employee's presence unmistakably sends to other employees regarding their statutory rights. In this case, the Employer has recognized the Union and entered into a collective-bargaining agreement, which can reasonably be viewed as a living, ongoing, ever-present notice, one that sends an indelible and positive message to employees regarding their rights under the Act—in a manner that a temporarily posted notice could never match. In these circumstances, I am satisfied that the employees' statutory rights have been validated and vindicated.

Additionally, the General Counsel argues that this settlement agreement is too late in the proceedings, having occurred some 7 months after the hearing closed—and literally days before I issued my decision.[7] While certainly late in the game, I do not view the settlement agreement's timing as precluding its approval. In that regard I note that the inherent risks of the litigation were still on the table at the time of the agreement, since my decision had not issued and the parties did not know which way the dice were going to roll. Moreover, it is highly likely that whichever party (or parties) did not prevail at trial would file exceptions to my decision, and that even the party which prevailed would likely file cross-exceptions before the Board, if such party did not prevail on every issue. Thus, the litigation in this matter, with all its inherent risks, was likely to continue into the foreseeable future. By accepting the settlement, or part of the settlement, I am laying part of this matter to rest and potentially conserving resources, assuming the Board affirms my decision regarding the approval of the settlement and withdrawal of the charge(s). Even if the Board does not, for the reasons I will discuss below, a remand will be unnecessary. Accordingly, I conclude that even at this stage of the proceedings, a settlement agreement is still useful, preserves resources, and that its acceptance is warranted.

With regard to the third prong in *Independent Stave*, there is absolutely no evidence of fraud, coercion or duress, and thus this factor is not applicable. Finally, regarding fourth prong under *Independent Stave*, the General Counsel does not contend that the Respondent breached a prior settlement by the conduct alleged in the consolidated complaint. It argues, however, that the withdrawal of the charge(s) should not be permitted because Respondent has a "history" of violating the Act, as evidenced by the Formal Settlement Agreement entered into in Cases 20–CA–148119 and 20–CA–151225, approved by the Board on September 24, 2015 (Jt. Exh. 3). I note, however, that the actual Formal Settlement Agreement has <u>not</u> been made part of the record, so I am left to wonder whether by entering into this agreement Respondent actually admitted violating the Act. Curiously, while the Decision and Order of the Board contains a provision directing Respondent to cease and desist from engaging in certain conduct, nothing in the Decision and Order actually finds or concludes that Respondent committed unfair labor practices or violated the Act in any manner. Thus, I am not satisfied that the Board's September 24, 2015 Decision and Order,

[7] At the time I received the Charging Party's motion to withdraw the charges on September 28, 2016, I had essentially finished writing the decision regarding the unfair labor practices, and was beginning to write the recommendation on the objections. I informed the parties of this fact during a conference call held to discuss these new developments.

based on the record before me, establishes that Respondent has a "history" of violating the Act, nor that Respondent has engaged in recidivist conduct that would preclude me from approving the withdrawal of one charge in the present circumstances.

Moreover, even assuming that Respondent indeed admitted violating the Act in the Formal Settlement Agreement described above, I note that the alleged violations in those cases were different in nature and less extensive than in the current case. The main allegation in the prior cases revolved around Respondent's unlawful recognition of an "in-house" union and a contract it entered with said union, with some additional—albeit limited—allegations of interference with pro-union leafleting, and surveillance of such activity. Respondent agreed to cease and desist from such conduct, and there is no evidence it reneged on such agreement. Most of the conduct by Respondent alleged in the present cases preceded the Formal Settlement Agreement in the prior cases, so it cannot reasonably be said that Respondent was engaged in recidivist conduct, which is the conduct targeted by the Board in the last prong of the *Independent Stave* test. Given the nature and extent of the new conduct alleged, it is commendable that the parties here have reached such a comprehensive agreement to put at least part of these controversies to rest and turn a new page in the relationship between the Employer, its employees, and the Union, which has now been recognized as their collective bargaining representative. Such efforts should be rewarded by not needlessly pursuing a legal recourse to resolve a dispute the parties have decided to put behind them.

Accordingly, and in light of the above, I have concluded that it would effectuate the purposes of the Act to allow the Charging Party Union to withdraw the charge in Case 20–CA–161534. Thus, the Union's motion is GRANTED, but *only* as to Case 20–CA–161534.[8] For the reasons discussed above, I deny the Union's motion as to the charge in Case 20–CA–167627, which alleges discrimination directed at Vargas, allegations not addressed or remedied by the settlement agreement between Respondent and the Union—and opposed by Vargas.

Despite my having approved the withdrawal of the charge in Case 20–CA–161534, I nevertheless believe it necessary to discuss the conduct alleged in that charge, because as discussed above, such conduct may show animus and thus motivation with respect to the alleged conduct by Respondent toward Flugence and Vargas, as alleged in Cases 20–CA–160321 and 20–CA–167627, which will be discussed below. I will accordingly discuss the conduct alleged, assess the credibility of the witnesses or individuals involved in the incidents, and make the appropriate findings of fact with regard to such incidents. I will not, however, reach any conclusions of law as to whether the conduct that I find occurred violated the Act, since such conduct is no longer part of the pleadings, in light of my decision to approve the withdrawal of Case 20–CA–161534. This approach will also have the additional benefit of allowing the Board, should it decide not to affirm my approval of the withdrawal of

[8] In light of my ruling, I am dismissing paragraphs 6, 7, 8, 9, 10, 11 and 15 of Complaint I. It should be noted that paragraph 16 in that complaint alleges that the conduct described in paragraph 11 (as well as other paragraphs) violates Section 8(a)(3) and (1) of the Act. This is clearly a mistake, perhaps a typographical error, as nothing in paragraph 11 alleges discriminatory conduct, only arguably coercive conduct in violation of Section 8(a)(1).

the charge, to reach its own conclusions of law with regard to the conduct I find to have occurred in my findings of fact.

Accordingly, and in light of the above, I will now proceed to make the following

II. FINDINGS OF FACT

A. Jurisdiction and Labor Organization Status

Respondent admits, and I find, that at all material times, it has been a California corporation with offices and places of business in San Francisco, Santa Clara, and Los Angeles, California, where it is engaged in providing transportation services. During each of the calendar years ending on December 31, 2014 and December 31, 2015, Respondent, in conducting its business operations, derived gross revenues in excess of $500,000, and during each of said calendar years, purchased and received at its California facilities, goods valued in excess of $5000 which originated from points outside California. Respondent also admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

B. Overview of Respondent's Operations and Other Background Facts[9]

Respondent, which was founded by its Chief Executive Officer (CEO) Gary Bauer, around 1989, provides transportation services for a variety of clients throughout the San Francisco Bay Area, primarily out of its facilities or "hubs" in San Francisco (located at Pier 50) and Santa Clara. It also maintains a smaller hub at the "campus" of one of its corporate clients, Cisco Systems ("Cisco"), in Milpitas, which is considered part of the Santa Clara operation. Respondent operates a fleet of buses, mini buses, shuttles, vans, and other vehicles it uses to transport its clients. In essence, Respondent provides two distinct types of transportation services for its clients. First, what is commonly referred to as its "commuter" or "transit" routes, consists of regularly scheduled weekday routes to/from its clients' business facilities to/from different locations, such as clients' sister facilities, train stations, Bay Area Rapid Transit (BART) stations, bus stations, or other centrally located pick-up points. In essence, Respondent transports employees of its clients to/from these locations, on a regular Monday through Friday schedule. The second type of service Respondent provides is what is commonly referred to as the "retail" or "charter" service, typically involving a specifically-scheduled or one-time event, where clients are transported to/from specific venues on specific dates for special events. These charter routes operate both during the week as well as weekends, but tend to be seasonal, with certain times of the year being busier than others.

As would be expected, those drivers who operate the commuter or transit routes are commonly referred to as "commuter" drivers, whereas the others are typically referred to as "retail" or "charter" drivers. Although many drivers prefer to have "commuter" routes because

[9] These background facts are not in dispute, unless otherwise stated.

these provide a regular schedule and income, some drivers prefer the flexibility of the retail routes, which allows them to choose when to work. Some drivers drive both types of routes, in order to supplement their income. For example, a commuter driver could supplement his/her income by also doing charter runs either on weekends or between their "split shifts" on weekdays. A driver on a split shift, for example, would drive commuter routes from 6–7 a.m. to 10–11 a.m., then from 2–3p.m. to 6 p.m–7 p.m. during the week. During the 3–4 hour layover between morning and afternoon shifts (hence, split shift) such driver could pick up some additional work and income by driving a short retail or charter run in the middle of the day.

Bauer is Respondent's CEO, as mentioned above, whose office is in the Pier 50 San Francisco ("SF") yard—although he also works out of his home. Bruce Neuhart was Respondent's chief operating officer (COO) at the time of the events in this case, although he is no longer employed by Respondent; Kenny Walker is Respondent's director of human resources; Angie Johnson-Coleman is Respondent's safety & training manager; Maureen Feeney is Respondent's dispatch manager; Scott Miklos is Respondent's account manager (at Cisco); and Joseph Knox is Respondent's dispatcher. All of these individuals are admitted Section 2(11) supervisors and Section 2(13) agents of Respondent, and all are based in the SF yard except Miklos, who works out of the Cisco campus. As discussed below, all of these individuals testified during these proceedings, as did numerous other employees. It is generally undisputed that Respondent held regular driver meetings at the SF and Santa Clara ("SC") facilities every other Friday (with SF and SC alternating Fridays), and at the Cisco campus once a month, typically on the last Thursday of the month. It is also undisputed that prior to the events alleged in the complaints, or the representation petition being filed, Respondent provided lunch for its drivers at the Friday meetings in SF and SC.

As discussed below, the legal background to this case, and the events related to such background, are relevant and provide context to the issues that are in dispute. It is undisputed that in March 2015,[10] Respondent recognized an in-house union called the Professional Commuter Drivers Union (PCDU) that purportedly represented Respondent's drivers, and promptly signed a collective-bargaining agreement with such union. The Charging Party Union in this case (Teamsters Local 665) filed a charge in case 20–CA–151225 alleging unlawful domination, assistance and recognition of PCDU, and the Region issued a complaint after finding merit to these allegations. Based on this complaint, the Region also filed a petition for injunctive relief under Section 10(j) of the Act in U.S. District Court on August 21. The petition filed with the court, and served on Respondent the same day, attached copies of affidavits provided by seven of Respondent's employees in support of the charge, including an affidavit provided by Roy Flugence, who is alleged to have been discriminatorily discharged by Respondent in this case. On September 15, Respondent entered into a Formal Settlement Stipulation to resolve the charges, which was approved by the Board on September 24, before the proceedings in the U.S. District Court took place.[11]

[10] All dates hereinafter shall be in 2015, unless otherwise indicated.

[11] Jt. Exhibits 3, 4. Respondent and the General Counsel reached the agreement to enter into a formal settlement on September 14, the day the matter was scheduled to go on trial before an Administrative Law Judge. As a result of this formal settlement, Bauer read a Board remedial Notice to employees during meetings in SF and SC at the end of September, a couple of days prior to the September 30 election. As a result of the formal settlement, the General Counsel and Respondent entered into a Stipulation and Order indefinitely postponing the case pending in U.S. District Court, which had been scheduled for oral argument on October 1. (Jt. Exh 4).

The Union/Petitioner had also filed a representation petition in case 20–RC–150089 with the Board on April 14, seeking to represent a unit of commuter drivers employed by Respondent at its SF and SC (which included the drivers at the Cisco campus) facilities, and an election was eventually conducted on September 30.[12] As discussed above, however, I approved the withdrawal of the objections in the representation case pursuant to a motion made by the Union/Petitioner on September 28, 2015 as a result of a settlement agreement reached by the Union and the Employer.

C. The Alleged Conduct by Respondent

1. Respondent's alleged conduct at the Cisco campus during August–September[13]

Art Araiza, a commuter driver employed by Respondent for about 5 years at its SC facility, but working out of the Cisco campus, testified that he had first contacted the Union in early March to begin organizing Respondent's drivers.[14] He and other drivers attended a series of meetings with the Union and were responsible for soliciting authorization cards and speaking to fellow drivers to support the Union. (Tr. 95; 97–106).

About 11:30 a.m. on or about August 7, Araiza testified that Cisco Account Manager Scott Miklos brought lunch for the drivers and informed them that Bauer wanted to meet with them. Araiza pointed out that Respondent had previously never provided lunch for its drivers at the Cisco campus, and that Bauer had rarely visited at Cisco previously. After the lunch had been provided, while Araiza was sitting in his shuttle bus, Bauer approached him and said that his (Araiza's) name had been mentioned by other drivers, and asked if there was something he did not like about the company or himself. Bauer also asked if there was something he could do to make things better. Araiza responded that Bauer had heard his name because a lot of employees were talking, not just him, and that while their wages had been increased (in March), he was still shopping at Dollar Tree (in reference to a discount store). During this exchange, Bauer handed Araiza a set of miniature speakers, with the logo "iCars," to be used with his cell phone, as well as a compact disc (CD) with music.[15] (Tr. 109–112; 179–180).

Ernest Lewis, a commuter driver based at Cisco who has worked for Respondent for about 2 years, also testified about a conversation he had with Bauer on August 7, at the Cisco campus. Lewis also testified that the Cisco drivers were provided with lunch on that day around 11:30 a.m., by Miklos, something that Respondent had never provided previously. According to Lewis, after lunch was provided, Miklos informed them that Bauer wanted to have a word with the drivers. Bauer showed up shortly afterward, and met with Lewis and a couple of other

[12] The proceedings in Case 20–RC–150089 had apparently been held in abeyance pending the final resolution of the unfair labor practice proceedings in case 20–CA–151225, which was formally settled on September 15.

[13] This is the conduct alleged in paragraphs 6 and 11 of Complaint I.

[14] Initially, Araiza and others had contacted and met with Teamsters Local 287, based in San Jose, which was closest to the SC facility and Cisco campus. Soon thereafter, however, it was determined that Teamsters Local 665 (the Charging Party/Petitioner), based in San Francisco, had jurisdiction, since Respondent was headquartered in San Francisco, where a majority of its employees were based.

[15] "iCars" refers to a service, similar to Uber, which Bauer was promoting for another of his companies. A photo of these speakers, next to a dollar bill as a size comparison, was received as R. Exh. 3. A photo of the cover of the CD was received as R. Exh. 2).

drivers. One of the drivers asked Bauer about health benefits, and Bauer said that he was "looking into" getting them better health benefits.[16] According to Lewis, Bauer also asked the drivers about their routes and how everyone was doing. Bauer also gave Lewis and the other drivers a set of miniature speakers and a music CD, the same previously described by Araiza. (Tr. 208–209; 211; 218).

With regards to the events of on or about August 7, Bauer testified that he did not specifically recall giving Araiza a set of speakers or a CD, but testified that giving these types of gifts was something that he had routinely done during meetings with employees for a long time. He testified that he did have a conversation with Araiza around this time about "general topics," but denied asking Araiza if there was something he did not like about Bauer's (which is not alleged in the complaint), or telling him that he (or Respondent) could not afford to pay the drivers more (although this is not what Araiza testified to). Bauer also denied telling Lewis that he was looking into getting the drivers better benefits, and described his conversation with Lewis and Araiza, as well as other drivers, in general terms, which he described as "just normal conversation" or "general statement(s)" such as "how are you doing" or how are things going?"[17] Additionally, I would note that Bauer admitted that lunch was provided to the drivers at Cisco, although he testified that this practice was begun in June or July, which is contrary to the testimony of not only Araiza or Lewis, but also of Vargas, who also testified this began in August. I credit the testimony of Araiza and Lewis as to the events of August 7, not only because their status as current employees enhances their credibility, but because they provided greater detail and their overall recollection of these events appeared better than Bauer's.[18] (Tr. 919–920; 922–925; 927–929).

Araiza additionally testified that he attended a drivers meeting held at Cisco on the evening of August 27, which was conducted by management officials Bauer, Neuhart and Miklos, and attended by about a dozen drivers. Bauer began the meeting by thanking the drivers for taking good care of the "account" (client), then asked the drivers if they had any concerns he might be able to help with. According to Araiza, the drivers were at first silent, but then began to voice various concerns. One of them, Reyna Morales, said she did not want a union. Bauer told the drivers that he had already given them a raise (earlier in the year), and that this was pretty much all he could do at this time, because the money wasn't coming in—and would not provide for higher benefits or wages. Araiza further testified that he told Bauer that he was doing a lot of extra work for the company, much of it after hours and beyond his regular duties, and that he believed he was a loyal employee. Bauer replied "I am not sure if I would call that loyal." Araiza also described how fellow driver Guillermo Vargas, who had attended several union organizing meetings with him, pointed out to Bauer that Respondent had lost the Google and Facebook accounts, only to see those companies hire other companies that were—or eventually

[16] During cross-examination, Lewis testified that Bauer did not say that the drivers *were* going to get better benefits (Tr. 218). Erschell Love, a driver at Cisco called as a witness by *Respondent*, corroborated Lewis' testimony that Bauer said he would look into getting better benefits at one of the meetings at Cisco. (Tr. 1122).

[17] As further discussed below, this is how Bauer often described his meetings or encounters with drivers, in general terms, often using vague language about employees being part of the "family" or "team."

[18] I would also observe that it is more plausible that an employee would remember an encounter or conversation with the head of the company in more detail than the head of the company would remember an encounter with a given employee, considering the multiple encounters that high-ranked management officials such as Bauer have with numerous employees. This is especially true in the case of Bauer, for reasons set forth below.

went—union. He told Bauer to let the drivers vote for the Union. Araiza did not say whether Bauer replied to these comments. (Tr. 113–114; 116–117).

Guillermo ("Willie") Vargas has worked as a driver for Respondent since 2007, and at the Cisco campus for the last 3 years, until September 30. He testified that Respondent first started providing lunch to the drivers at Cisco in August 2015. On the last Thursday in August (which fell on the 27th), he attended a drivers meeting conducted by Bauer, with Neuhart present, and a number of drivers. According to Vargas, Bauer, early during the meeting, compared the Union with oranges, stating that he had only so many oranges in his house, and that if too many people asked for oranges he would run out of oranges. Bauer also said that this was his company, that he had worked hard for it, and that he did not want the Union and would not deal with it, and that he would rather sell the company if the Union came in. Vargas said he pointed out that Respondent had lost the Google account, which had then hired a unionized company that paid good wages and benefits. Vargas added that Araiza said "that's what we want." Vargas testified that Morales then said that they did not want or need a Union, that Bauer is a nice boss, who gives us food. Araiza replied that food would not buy them uniforms or ties. Vargas added that during this last exchange, Bauer's face was down, and he looked disappointed.[19] (Tr. 232–234; 248; 251; 254; 257–262; 324–325).

Regarding the meeting on or about August 27, Bauer testified that the topic of the Union never came up, and that there was no discussion about wages or benefits either. He did not deny asking drivers about their concerns, he testified he did so in a very general fashion, such as by asking "how are you?" or "how is everything going?" or "are the routes OK?" He also testified that the discussions were "pretty general" in nature, regarding routes, vehicles, maintenance, and whether the client(s) were being well taken care of. He did admit speaking about "oranges," which he said he did as an analogy to routes, meaning that there were only so many routes available, and that there was nothing else to offer in that regard. (Tr. 931–935). I credit, except as described below, the testimony of Araiza and Vargas regarding what was said at this meeting. In this regard, I note not only that as current employees their credibility is enhanced, but they provided vivid and detailed accounts of what transpired during the meeting—despite some variations—and their version is supported by others' testimony about similar statements made by Bauer at other venues, as discussed below. In contrast, for example, Bauer could not recall which other members of management attended this meeting, and his description of events and statements was again vague and general in nature. Moreover, his testimony that the subject of the Union did not come up at this meeting (or in most others, either) is belied by the testimony of numerous witnesses, for both sides, who testified that the subject of the Union was coming up on a regular basis during meetings around this time frame.[20] Accordingly, I do not credit Bauer's testimony. On the other hand, while I generally credit the testimony of Araiza and Vargas, I do not credit Vargas' testimony that Bauer said at this meeting that he would shut the company

[19] In paragraph 6(c) of Complaint I, the statements and exchanges described by Vargas are alleged to have occurred on or about September 28 or 29, but Vargas testified it occurred in late August, as described above.

[20] Indeed, the record indicates that Bauer, prior to this time, seldom visited the Cisco campus or the SC facility on a regular basis, but his visits to these facilities became more frequent during this time. It is hard to imagine that these visits were for unspecified "general purpose" or no particular purpose reasons, in light of the union campaign that was going on. Moreover, Bauer's explanation for his "oranges" analogy makes no sense, and is indeed contradicted by Respondent's own witnesses, as more fully described below. In short, I did not find Bauer to be a credible witness.

down rather than let the Union in, which I note was not corroborated by Araiza or any other witness—nor alleged in Complaint I as having occurred at this meeting.

Both Araiza and Vargas testified that a meeting was held at Cisco on or about September 28 or 29, just before the election, attended by about a dozen drivers and by Bauer, Neuhart, Miklos, Angie Johnson-Coleman and a couple of other managers.[21] At this meeting, Bauer stated that he had held an earlier meeting at the SC yard, and that another company—a unionized competitor—had apparently placed flyers on the windshields of Respondent's driver's cars, soliciting them to apply for jobs. According to the testimony of not only Araiza and Vargas, but other witnesses, including Respondent's, Bauer was upset at such audacity, and stated (according to Araiza) that if the drivers wanted what that company was offering, they should go work there.[22] During the discussion of either that flyer, or a flyer that discussed how much dues and initiation fees the Union would charge the drivers if they elected the Union, it is undisputed that driver Reyna Morales asked to see the flyer. She then pointed at Araiza, who was sitting on the table near her, moved in his direction and said "let's ask the Union guy." At that point Vargas, apparently upset at Morales for exposing or "outing" a main Union supporter, got up and stated that this was "bullshit" and that he didn't want to listen to this "stupid woman" anymore, and walked out of the meeting.[23] (Tr. 119–122, 185–187, 265–269, 936–947, 1009–1013; R. Exhs. 4, 5). The only statement which is disputed in the above account of the September 28 or 29 meeting is Araiza's account of Bauer saying that drivers should go elsewhere if they did not like the way things were, which I credit, not only for the reasons described earlier, but because Respondent's witness Morales corroborated it (Tr. 1031).[24]

As described below, there were other events at the Cisco campus on September 30, involving an incident between Vargas and Morales, which will be described separately in the section discussing Vargas' suspension.

2. Respondent's alleged conduct at the SC facility in August–September

Sam Tomasello, a (commuter) driver employed by Respondent for about 3 years and based in SC, testified that he has attended about 3 or 4 quarterly meetings held by Respondent at a local hotel, in which numerous prizes are regularly given out. He also attended the mandatory meetings held each month in SC, during which lunch has been served. According to Tomasello, these meetings became more frequent starting around July, occurring on a weekly basis, and were attended by Bauer and Neuhart, which was unusual, since regular monthly meetings were typically attended only by "account" managers. He testified he attended about 4 of these

[21] These additional managers, not named in the complaint(s), were Bob Crane and Alicia Stanford.

[22] Although Vargas did not corroborate this statement by Bauer in his testimony, Reyna Morales, called as a witness by Respondent, did. According to Vargas, Bauer asked if anyone knew who Jimmy Hoffa was (someone said he was associated with the Mafia), and said that Jimmy's son was now running the Teamsters union, and making in excess of $300,000 per year.

[23] While Vargas was not asked, and did not explain, why he reacted in the way he did, it is reasonable to infer that the reason was as surmised above. There are a few minor differences between Araiza and Vargas, and between them and Respondent's witnesses, as discussed below, in their account of this exchange, but these differences are not significant because the salient facts are not in dispute. In that regard, I note that not only Morales, but Neuhart and Bauer essentially told the same story about Vargas' reaction to Morales' actions.

[24] I would note, however, that such statement is not alleged in the complaint.

meetings conducted by Bauer, although he did not initially provide dates for these meetings. According to Tomasello, during the course of these meetings Bauer essentially said the same things: that the Union came from a "Mafia" background, and that if the Union came in, the drivers would have to go on strike, which they might not be able to survive. Bauer also said if there was a strike that the retail drivers would take over their jobs, and that if the Union came in, commuter drivers would not be able to work retail routes on weekends, and that their hours would be cut because they would not be able to work overtime. Tomasello further testified that Bauer asked the drivers "what can I do to stop you going down the Union road?" and that the drivers replied that they wanted better pay and benefits. Bauer said that he charged clients $100 per hour, and after overhead only $3 was left, so he could not afford to give drivers more. According to Tomasello, Bauer repeatedly asked during these meetings "what can I do to help you guys?" On the day before the election, according to Tomasello, Bauer held a meeting at SC, and again asked what he could do for the drivers not to "go down that road" (meaning the Union). Bauer also stated that it took him 26 years to build the company, and that "they" (the drivers) were trying to take it away from him by going Union—and that if "they" went Union, he would shut it down. (Tr. 352–353; 357–375). During cross-examination, however, Tomasello modified his testimony, agreeing that Bauer had said that "*if*" the Union called a strike, the company might be shut down or the commuter drivers may be replaced by the retail drivers—not that there *would* be a strike if the Union came in. (Tr. 388). He re-confirmed his testimony, however, that Bauer had said he would not have any additional money to give the drivers, whether the Union was there or not. (Tr. 391).

Bauer denied making any of the above statements testified to by Tomasello, specifically denying discussing how much the company received per hour of service, or discussing overtime, or that there would be a strike if the Union was chosen, or stating that commuter drivers would not be able to drive retail routes, or that the company would shut down, etc. He did testify, however, that the subject of the retail routes was brought up by a driver who asked if commuter drivers would still be able to work on those routes if the Union won, to which Bauer testified he replied that this would be up to "the bargaining unit." Notably, Respondent's counsel repeatedly asked Bauer if he had spoken about his "feelings" regarding the company that he had founded, and how he felt about the events that were unfolding.[25] Bauer at first digressed or "punted," but finally—after much prodding—admitted that all he had said was that he had been in business for 26 years and that it was great to work together "as a team" and that it was ultimately up to the drivers to decide what they wanted (See Tr. 957–959). He specifically denied, however, that he conveyed to the drivers the feeling that they were trying to take something away from him (Tr. 959–960).

Such testimony stands in stark contrast not only to the testimony of General Counsel's witnesses, but notably to the testimony of those called to the stand by Respondent, including

[25] By this point in time several witnesses—including Respondent's own witnesses—had testified that on different occasions and venues Bauer had spoken about how he built the company from scratch over 24–26 years, and how he wasn't about to let somebody else take over. For example, Scott Miklos, Respondent's account manager at Cisco, testified how Bauer, during a meeting with employees, had used the metaphor of his business being like a house that he had built, only to have someone move in and tell him how to run the house. Miklos testified that he understood this metaphor (or "analogy," as he described it) as being about the Union coming in and taking over the business (Tr. 860; 880–881). In addition to Miklos, employees Lewis and Tomasello, as described above, as well as Henderson, McBounds and Wimberly, as discussed below, related similar stories.

Miklos—and employee Cindy Wimberly. Wimberly, a driver who occasionally works out of the SC facility, testified that she attended a meeting at that location where Bauer spoke.[26] According to Wimberly, Bauer used the "analogy" of a house or structure that he had built, only to find that some of the "children" who lived in this family's home were disrespecting it, by not taking care of or appreciating what he had built. She testified that Bauer stated he felt "betrayed" by these children, whom she clearly understood meant those who supported the Union, which was the subject being discussed at this time. (Tr. 1068; 1083–1084) Wimberly generally denied that Bauer had made any promises.

I thus find Bauer's testimony in that regard to be disingenuous and untrustworthy, adding doubt about his overall credibility, as previously expressed. Although Tomasello's testimony was somewhat scattered and not specific as to the dates of certain statements, I found him to be generally credible, particularly in light of his current status as an employee giving testimony adverse to his employer's interest. Additionally, I note that many of the statements attributed to Bauer have been confirmed by others, albeit in different venues, which indicates a pattern of conduct. Specifically, I credit Tomasello's testimony that Bauer asked the drivers what he could do for them; suggested that drivers (who supported the Union) were trying to take the company away from him; and said that commuter drivers would lose the retail routes (and thus, overtime) if the Union came in. On the other hand, I do not credit the testimony that Bauer said that there *would* be a strike if the Union came in, or that he would shut the company down in the event of such strike.[27]

Additionally, Tomasello testified that during the course of the mandatory employee meetings at SC, which increased in frequency in early July, the drivers started receiving different types of gifts or "prizes" from Respondent. These gifts or prizes, which were sometimes awarded as part of a raffle, included coffee mugs, wireless speakers for iPhones (previously described by Araiza), (San Francisco) Giants tickets, and Starbucks gift cards. According to Tomasello, everyone picked out a number from a hat or bowl, and each of those numbers corresponded to a different gift, so that everyone won something. (Tr. 362; 373). Bauer testified that Respondent has been holding raffles for employees at meetings and other events for years, as well as giving employee performance awards for safe driving, conserving fuel and other similar good practices. He also testified that Respondent has also given employees small gifts like the CDs and iPhone speakers for years on a regular basis in order to promote Respondent's business or related businesses in which Bauer has a stake. (Tr. 916–917). Bauer's testimony was supported by the testimony of employees Wimberly and Gil Cachuela, who testified that raffles and gifts like the ones described by Tomasello had been Respondent's practice long before the advent of union organizing. I particularly note the testimony of Cachuela, who had been an employee since 2006 and testified these kinds of practices had been in place back then. (Tr. 1071–1073, 1130). Accordingly, and in light of the fact that Tomasello was not very

[26] Wimberly testified that this meeting occurred about 2 months prior to the (September 30) election, although it could have been closer to the election. (Tr. 1065–1066)

[27] Angela Johnson-Coleman ("Johnson"), Respondent's training manager, testified that she was present at some of the meetings at Cisco and SC where Bauer spoke. The record does not show, however, that Johnson was present during *all* the meetings at these facilities when Bauer spoke. Moreover, she did not at all recall what Bauer or others said at the meetings she attended; she only appeared to remember what Bauer did *not* say, in answer to specific serial questions about what others testified Bauer had said. Accordingly, and for the reasons further discussed below with regard to the SF meetings, I do not credit or give weight to her testimony. (Tr. 778–779; 781–783).

specific or precise regarding the dates of the meetings in question, I credit Bauer, Wimberly and Cachuela, and conclude that the kinds of gifts and raffles in question had been practiced by Respondent before the advent of union activity.

As briefly discussed in the background facts, an election was held on September 30 pursuant to the petition in Case 20–RC–150089, with polling places located at the SF and SC facilities. An aerial view photograph of the SC facility was introduced as a joint exhibit, which among other things depicts the location of the polling area, parking area, and some of the buildings at that location (Jt. Exh. 2(b)).[28]

Vargas testified that at approximately 5 a.m. on the day of the election, he arrived at SC and went directly to the voting trailer to cast his ballot. There, at the top of the stairs leading to the (open) door of the voting room, Vargas ran into Neuhart, who was just standing there. Neuhart asked Vargas "where are you going?" Vargas, who testified he had to walk around Neuhart, replied that he was going to vote, and then went inside the trailer to do so. According to Vargas, he was apparently the first voter, and only the Board agent and Araiza, who was the union observer, were present inside. After voting, Vargas went back to his car, which was parked on the street near the intersection of Mathew Street and De La Cruz Blvd., and for a period of about 30 minutes, observed Neuhart walking around the employee parking lot (in the area near the "office") speaking on the cell phone.[29] Neuhart did not deny any of this, but testified he did not recall running into Vargas at the stairs of the voting trailer. He explained that the Employer's observer for the election was running late because of traffic, and he went into the polling area to inform the Board agent—who asked him to leave, as the election had started. Neither Vargas nor Neuhart testified that they saw other employees at the parking lot during this time (Tr. 270–279, 340–341, 345, 642–647, 669–670).

Since Neuhart did not deny Vargas' account of these events—he only testified that he did not *recall* seeing Vargas (or any other voter)—I credit Vargas' testimony.

Additionally, there is testimony that on September 30, the day of the election, food and beverages were provided to employees at the SC facility. Thus, Araiza testified that he was the observer for the Union at SC on the day of the election. According to Araiza, the polls opened at

[28] This photograph (Jt. Exh. 2(b)) has yellow-highlight markings that depict the size of the yard and some of the buildings (measured in feet or square yards), and the distance between various buildings and other permanent fixtures. On the right hand side of the exhibit, running from the top of the page toward the bottom, is Mathew Street, which bounds the SC yard on one side. At the bottom of the Exhibit, running from left to right, is De La Cruz Boulevard, bounding the yard on that side. The boundary of the SC yard appears in broken yellow lines. On the right-hand side of the photo, to the left of the "Mathew Street" (and immediately to the left of a yellow number that says "+-205") is what appears to be a shed or trailer, which was the location of the polls ("polling trailer"). Immediately below that is a yellow rectangle with the wording "Skylights Crane" and a smaller rectangle on the larger rectangle's lower right-hand corner, with the wording "office." Below that, wrapping around another yellow rectangle with the wording "Open Shop/Showroom" is a parking area, which according to testimony was an employee parking lot.

[29] Vargas testified that the area of the parking lot where he saw Neuhart, in the area below the "office," was located about 40 feet from the election trailer. The aerial photo of the yard, however, shows a large rectangular space which is actually a building, which itself contains the "office," between the parking lot and the voting trailer. In light of the size of various objects in the photo, including motor vehicles in the parking lot, however, it would appear that the distance from the voting trailer to this area was more than 40 feet.

5 a.m., but the Employer's observer, Joe Davis, arrived after the election had already started. About 30–45 minutes into the election, after Davis had already arrived, he got up and walked out of the polling area, saying he needed to go to the restroom. When he came back, he brought back coffee and doughnuts. (Tr. 122–126). Respondent's witness, Morales, who worked at Cisco, testified that she was in the SC facility mid-morning on that day, as a result of an incident that happened at Cisco that morning, as further discussed below. While she waited for Neuhart at the SC facility to interview her regarding the incident at Cisco, she testified that she helped herself to coffee and doughnuts which were available at the dispatcher's office (Tr. 1040–1041, 1054). Finally, Neuhart testified that sometime after he went into the polling room around 5:00 a.m. to notify the Board agent that Davis was running late, he left the facility to get coffee for himself and "Elba," an assistant at SC, and doughnuts for the staff. He later contradicted himself, saying that he did not bring back coffee for Elba, because she doesn't drink coffee (Tr. 643–645, 677–678, 680). Based on the above testimony, which was not rebutted, I conclude coffee and doughnuts were provided by Respondent to employees at SC on the morning of September 30.

3. Respondent's alleged conduct at the SF facility during September

Feranzo McBounds testified that he worked as a driver at the SF facility from March to November, 2015. He was initially a commuter driver, but was switched to retail runs in mid- to late September, following an accident. He testified that mandatory meetings became more frequent just before the election. In mid-September, about 2 weeks before the election, he attended a meeting presided by Bauer, and also attended by Kenny Walker, Mike Albertolle and numerous drivers. According to McBounds, Bauer told the drivers that he had built the company over 24 years and did not want the Union coming in and telling him how to run his company, or taking over the company. Bauer told the drivers that if they did not like it here, they could go elsewhere, and asked "what else can I do for you guys?" McBounds also testified that Bauer said that if the Union came in, commuter (transit) drivers would not have retail routes and would not be able to earn extra money, and that he would not be able to do a lot of "extra things" such as have parties and picnics for the drivers. (Tr. 490–493, 496–498).

Maria Henderson, a SF-based commuter driver who worked from November 2014 to February 2016, also testified she attended mandatory employee meetings in the 2- week period prior to the election. These meetings were led by Bauer, but also attended by Johnson and other managers. According to Henderson, at one of these meetings about 1 to 2 weeks before the election, Bauer told the drivers that they could vote as they chose, but that he built the company and that no one was going to come in and tell him how to run his business. Henderson added that Bauer was upset and indicated he felt the drivers were ungrateful because he had given them a raise (in February). Bauer said that if they (the drivers) didn't like it, they could go elsewhere, and that he would shut down before he let the Union in. Henderson also testified that Bauer said that if the Union came in, the (commuter) drivers would not be able to perform retail/charter work. (Tr. 558–561, 565, 567, 579).

Bauer testified that he did not recall discussing the Union at any of the meetings with drivers in SF, other than the meeting on September 25 during which he read the Board Notice in the presence of a Board Agent and union representatives. Yet, almost on the same breath, he

testified that the only thing he said during these meetings about commuter drivers driving retail routes if the Union won the election was that this would be decided after discussions with the Union, a direct contradiction of his earlier statement. (Tr. 963) Moreover, Bauer then serially denied making the statements attributed to him by McBounds and Henderson (Tr. 967–968), which strains credulity in light of the fact that he did not recall discussing the Union at all during these meetings. Likewise, Johnson testified that she was present at every SF meeting, but did not recall "anything specific" about what Bauer had said during these SF meetings. (Tr. 771). Yet, she similarly denied that Bauer had said any of the things attributed to him by McBounds and Henderson. The implausibility of these denials, in light of the above circumstances, persuades me that Bauer and Johnson are not credible. On the other hand, I found the testimony of McBounds and Henderson to be rich in details, internally consistent, and consistent with each other's, albeit not identical, which further enhances their credibility. Moreover, I note that their testimony is consistent with testimony by other witnesses—both the General Counsel's as well as Respondent's. Accordingly, I find McBounds and Henderson credible regarding what occurred at these meetings.[30]

It is undisputed that about mid-September, Respondent ordered and received at its SF facility a shipment of multiple items that had a "Team Bauer" logo imprinted on them. These items included buttons or pins, neck ties, hats, wristbands, and banners. It is also undisputed that Respondent ordered this paraphernalia as part of its election campaign, as admitted by Johnson.[31]

McBounds testified that all of these items were in boxes in Johnson's office, on her desk and on a corner table. About 2 weeks before the election, he was at Johnson's office when she offered him some of the "Team Bauer" paraphernalia to wear, stating that they had new hats, pins and neckties. According to McBounds, Johnson did not say she had to wear it, she just offered it. He accepted a "Team Bauer's" button which Johnson handed him. Additionally, McBounds testified that he heard Johnson offer another employee, Larry Woods, one of the "Team Bauer's items, and that he saw various managers, as well as other drivers, wearing the "Team Bauer's" items.[32] He also saw the "Team Bauer = no union" banner hanging at the SF yard. (Tr. 504–507, 510–511, 523–527).

Henderson also testified that she saw managers and drivers wearing the "Team Bauer's" paraphernalia in the 2 weeks before the election, and said that Johnson told her to help herself to one of these neckties while she was in Johnson's office—although she clarified that this occurred after the election. (Tr. 547–551; 557). Johnson, for her part, testified that the "Team Bauer's" items first arrived around September 18, and were initially kept in "Shed A," in the front office.

[30] During cross-examination, and in its brief, Respondent tried to paint McBounds and Henderson as biased because they were both discharged in the wake of accidents. I find this argument unpersuasive. While certainly employees who have been discharged may hold a grudge against their former employers, I found nothing in these witnesses' testimony or demeanor that would betray such animus. To the contrary, I found their testimony as forthright and candid, even admitting certain things that would appear to favor Respondent.

[31] A photo of a button/pin with the "Team Bauer" logo was introduced as GC Exh. 113 (with a pen next to it, as a size reference); and a photo of a "Team Bauer" necktie, along with a "Bauer Worldwide" necktie that had been used prior to September, was introduced as GC Exh. 114). Additionally, a photo of the banner, which in addition to the logo "Team Bauer," also has an "equals" sign (=) and the word "union" circled in red with a red slash across the word union (in other words, Team Bauer's means no union), was introduced as GC Exh. 119). (See, also, Tr. 499–500, 803–804).

[32] It's not clear if Woods was a driver in the bargaining unit or not; he did not testify.

The items, which were in boxes, were then moved to her office, and she said "everyone who walked in took one," or asked for one. The boxes were then moved to a shelf by the dispatch office, for people to help themselves to them, and as the supplies diminished, she re-stocked them. She denied asking anyone if they wanted one of these items, and testified she did not recall talking with McBounds about them, but added that McBounds' wife, who was also a driver, asked for one of the items.

I credit McBounds' version of his exchange with Johnson about these items, and conclude she offered him a "Team Bauer's" pin while they were in her office—which he accepted. I find McBounds credible not only for the reasons discussed previously, but also because I find his version is more plausible. In this regard I note that having piles of these items all over her office likely presented an irresistible temptation to offer them to those who visited, and that it is highly unlikely that at the time Johnson felt she was doing anything wrong by doing so.[33]

On the evening of September 29, on the eve of the election, Henderson was arriving at the SF yard from her commuter run when she received a call around 7:30–8 p.m. on her cell phone from Joe Knox, the dispatcher, while she still was in her vehicle. Henderson testified that Knox asked her if she could talk, saying he needed someone he could confide in. Henderson asked if this was about work, and Knox said no, he wanted to talk about the Union, and said that it would not be a good thing for the Union to come in. Knox asked if she planned to vote for the Union, which Henderson did not directly answer, but said that a Union could be a good thing, because she had been in a union before. Knox said that she would not have a job (if the union came in), and Henderson asked how could the union keep her from having a job. Knox said "think about it Maria, I got bills, you know, I have child support," and carried on about why a union would not be good, while Henderson reiterated her view that a union might be a good thing. While she was still inside her vehicle, Knox then asked her if she could see Bauer, and when she said no, he asked her to go find him in the yard, and to tell Bauer he was on the phone. Henderson got out of her vehicle, and while still on the phone, went to find Bauer, whom she eventually found in the shed, near the dispatch office. She approached Bauer and handed him her phone, saying Knox wanted to speak to him, and then went to the dispatch office to hand in her paperwork. After a couple of minutes, Bauer handed the phone back to Henderson, and then asked her why she wasn't wearing "Team Bauer." Henderson replied that she was always part of the team, but that she had never been given anything that said "Team Bauer." Bauer told Henderson that they had the right to vote how they wished the next day, and then proceeded to show her a paper with some sort of graph showing how much they were making in comparison to how much they would either gain or lose with the union. Henderson told Bauer that she needed to get home, and left. (Tr. 538–546).

Knox admitted that he called Henderson on September 29 and spoke to her for about 30 minutes, but denied mentioning the Union or the election. Rather, he testified that he called her to speak about her scheduling, because he had heard "rumblings" about Henderson being

[33] Indeed, it would be no exaggeration to state that only a few experienced labor lawyers would even know that such practice might be viewed by the Board as a form of unlawful interrogation—so scarce are the cases. Moreover, Henderson testified that Johnson also offered her one of these items, albeit after the election, which points to a modus operandi by Johnson.

frustrated with her scheduling and wanting more work. He wanted to find out what her concerns were to come up with a "game plan" to provide her with additional work. He admitted that during their conversation Henderson mentioned she had run into Bauer, but testified he never spoke to him. (Tr. 686–693). For his part, Bauer testified that he did not recall talking with Henderson the night before the election, or for that matter talking with her one-on-one in the period preceding the election. He denied discussing "Team Bauer's" with Henderson or asking why she wasn't wearing one of those items. (Tr. 968–969).

I credit Henderson's account of these events. Not only is her description of her conversations with Knox and Bauer on the evening of September 29 far more vivid and detailed than theirs, but under the circumstances far more plausible. Thus, while Knox admitted phoning Henderson on the eve of the election and engaging in a prolonged conversation (30 minutes) with her, he denied mentioning the Union or the election—something that I find implausible. Given the timing of this call—less than 12 hours before the polls opened—it is simply not credible that he was calling her for something completely unrelated, something he could have done on countless other dates or times. Moreover, even Knox's own version arguably suggests a suspect motive, soliciting grievances from an unhappy driver with an implied promise of a happy resolution on the eve of the election.[34] As for Bauer, he did not "recall" having a conversation with Henderson on the eve of the election, and thus did not technically deny it occurred. Further, I note that although he generally denied discussing "Team Bauer's" with her or other drivers, I find his credibility wanting, for the reasons previously discussed.

4. The suspension and discharge of Flugence

Roy Flugence worked as a driver for Respondent, initially at the SC yard and then at its SF facility, from 2013 until September 2015, when he was discharged. Although he worked primarily as a commuter driver with a split shift, he would occasionally supplement his income by working retail/charter routes in between his split shifts or on weekends.[35]

Flugence testified that he attended several union meetings with other employees during the Union's organizational drive in the Spring of 2015. As previously described, it is undisputed that the General Counsel filed a motion for Section 10(j) injunctive relief in U.S. District Court on August 21, alleging, inter alia, that Respondent had unlawfully recognized and signed a contract with an in-house union, the PCDU, in early 2015. In support of said motion, the General Counsel submitted to the court the affidavits of seven (7) employees, including two (2) from Flugence, copies of which were served on Respondent on the day the action was filed. Flugence was the only employee of Respondent at the SF facility to provide affidavits to the Board. In those affidavits, Flugence describes his steadfast opposition to PCDU and his confrontation with its self-appointed leader, Clarence Murdock, whom he publicly called a liar and Judas for deceitfully betraying the drivers whom he was ostensibly representing.[36] As also

[34] In other words, Knox's denial of Henderson's account but explanation for his actions places Respondent in an "out-of-the-pan, into-the-fire" dilemma.

[35] Flugence testified that he was not always comfortable driving retail assignments, and thus tended to avoid them, because those often involved driving in unfamiliar vehicles, terrain and roads, which Flugence believed raised a safety concern. (Tr. 399).

[36] Although it isn't clear on the record, Murdock was allegedly a former road supervisor of Respondent who "stepped down" from his position in order to create the PCDU and sign the contract with Respondent.

described earlier, the General Counsel issued a complaint against Respondent alleging an unlawful recognition of PCDU, a recognition that was withdrawn by Respondent as part of the formal settlement agreement agreed upon by the parties on September 14, and executed on September 15.[37] (Tr. 400–413; GC Exh. 110).

On August 21, the same day the U.S. District Court case was filed and served on Respondent, Flugence drove a retail/charter route about 1 hour south of San Francisco. A so-called "hold-and wait" job, it involved about 15 drivers/buses altogether, and consisted of picking up passengers and dropping them off at a certain location, repeating the process and doing continuous "loops" until the job ended. After doing some drop-offs, about 1 hour before the job ended, Flugence received a call on his cell phone from his wife, who was having a medical emergency.[38] Flugence unsuccessfully tried to reach his road supervisor on the job, (Londell) Lebon, and left him a message. Concerned for his wife, Flugence headed back to his base in SF, to return his bus and go home. About 20 minutes before Flugence reached the SF yard, a dispatcher called to tell him that 2 buses had broken down and that they needed an extra bus. Flugence replied that he had a family emergency and was returning to base. A few minutes later, Lebon called, and Flugence explained the situation. When he reached the SF yard, Flugence reported to the dispatcher, and explained that he had to go home because of the emergency. When he arrived home, Flugence had to take his wife to the hospital, where she was kept overnight. (Tr. 418–422; 466–468).

On August 26, 5 days after the above-described events, Flugence was called to a meeting in the office of Kenny Walker, Respondent's HR Director, also attended by Angie Johnson. Flugence was asked about the events of August 21, which Flugence explained, including his wife's medical emergency. Walker handed Flugence a "Corrective Action Notice" (CAN) (GC Exh.112), a written disciplinary notice, and suspended him for three (3) days.[39] When Flugence asked Walker about progressive discipline, Walker replied that the suspension could have been for 5 days instead.[40] (Tr. 423–427, 467–468). For his part, Walker testified that Flugence told him he had left the job because of his wife's medical emergency, but when he asked Flugence if he had told anyone, Flugence replied that he did not. (Tr. 1091) I do not credit this testimony, not only because Flugence credibly testified that he spoke to both dispatch and Lebon on his way back to SF, but because I find it implausible that he would not have said anything to anyone in

[37] This agreement apparently occurred on the proverbial "courthouse steps," on the day the case was scheduled to be heard by an Administrative Law Judge. As also previously described, this settlement also resulted in the U.S. District Court case being held in abeyance.

[38] Flugence's wife, who suffers from a seizure disorder, was having a seizure.

[39] The CAN (GC Exh. 112) states that neither Lebon nor dispatch were able to reach Flugence (to find out what was happening), and accuses Flugence of job abandonment. Neither Lebon nor the dispatcher on duty at the time (whoever that might have been) were called to testify to deny Flugence's account of these events. Accordingly, and for other reasons further discussed below, I credit Flugence's testimony that he spoke to both on his way to SF.

[40] It is noteworthy that Walker admitted that Respondent has a "progressive" disciplinary system in place, consisting, at the first step, of a verbal counseling, followed by a written warning, personal improvement plans, followed by suspension and eventual discharge for repeated offenses. (Tr. 1113) It is also noteworthy that there is no evidence that Flugence had earlier been disciplined for anything or had even received a verbal counseling. To the contrary, an evaluation showed he was considered an excellent employee.

the circumstances. Indeed, I note in the CAN, Flugence wrote that the statement that he had not notified anyone was false. (GC Exh. 112).[41]

On September 10, during the mid-day layover between Flugence's split commuter shifts, Maureen Feeney, Respondent's dispatch manager, asked Flugence if he could work a short retail assignment. The assignment was a "one way transfer," which consisted of picking up passengers at a certain location in downtown San Francisco, delivering them to their destination (also in SF), and returning to the yard. Before he accepted the job,[42] Flugence asked Feeney, not less than three times, if this job or account was connected to Fadi Stephan, a sales representative for Respondent, with whom Flugence had apparently experienced previous difficulties.[43] According to Flugence, Feeney assured him repeatedly that Stephan would not be in charge of this job, and so he accepted the assignment. Upon arriving at the pick-up location on Market Street (a main thoroughfare in SF) and lining up his bus, Flugence saw Stephan was there, apparently directing the operation from the sidewalk. He quickly phoned the SF yard and spoke to dispatcher (Joe) Knox, to whom he complained about Stephan's presence. Knox told Flugence to try to get along, and either to take (the assignment) or leave it. Flugence picked up his passengers, delivered them to their destination, and then returned to the SF yard. (Tr. 429–435).

When Flugence arrived at the yard with his bus—which was a large blue bus that Flugence typically drove—he was confronted by Mike Albertolle, the Fleet & Facilities Manager, who happened to be in the yard near the area where buses are parked after returning from a run. Albertolle accused Flugence of screeching his bus' tires as he made a fast U-turn in the yard, and wanted an explanation. Flugence, however, remained silent. Albertolle asked for his name, but before Flugence could respond, he turned and walked away, stating that he would find out. Flugence denied, however, that he had screeched his bus' tires while making a U-turn, stating that this is not possible, given the size of the yard and the bus. He also explained that he remained silent while Albertolle was making his accusations because he wanted to allow Albertolle to finish speaking and did not want to appear argumentative. Later that afternoon, Flugence went on his normally scheduled afternoon commuter run. (Tr. 435; 437–439; 471–472).

Albertolle testified that he was outside the office in the yard when he saw Flugence driving his bus into the yard in the wrong direction, going about 15–20 mph (in a 10 mph area), and screeching his tires while making a sharp turn. He immediately confronted Flugence, asking him what was going on, and why he was going so fast, as well as asking his name, but received

[41] It is also noteworthy that Walker testified that he considered Flugence's conduct on August 21 to be "insubordination" (Tr.1089), which not only unreasonably and unjustifiably stretches the plain meaning of the term, but which supports the inference, as discussed further below, that Respondent was artificially building up a disciplinary record against Flugence to justify its later actions.

[42] It should be noted that commuter drivers like Flugence are under no obligation to accept these retail assignments—they are purely voluntary, and as explained previously are usually undertaken to supplement their income.

[43] The nature or genesis of Flugence's difficulties with Stephan was never clearly explained in the record, but as unfolding events would show, one thing was clear: Flugence wanted nothing to do with Stephan; he did not trust him, nor wanted to work with him, nor even to be in his presence. Flugence testified he did not feel "safe" around him.

no answer. The next day, on September 11, he sent an email to Johnson about what he had observed (GC Exh. 120/2; Tr. 834–845).[44]

The following day, September 11, Walker called Flugence to a meeting, along with Feeney and "Mr. Jimmy," at the latter's office.[45] According to Flugence, they asked what had occurred the day before, apparently referring to the retail run, since no mention was made of the incident with Albertolle. Flugence, who testified he felt pressured by the questions of the three management officials, became emotional while repeatedly telling the story about how he had "begged" Feeney not to put him on a job involving Stephan. They told him to take the rest of the day off because he was too emotional, that they would further investigate this matter, and to return on September 14 to meet with them. On September 14, however, Flugence had been subpoenaed to testify at the unfair labor practice hearing in case 20–CA–151225, which settled on the day of the trial. Accordingly, Flugence met with Walker on September 16, at Walker's office. Walker informed Flugence that as a result of the investigation he was suspended for 3 days—with time already served—and was being placed on a 90-day probation period. He was asked to write a statement at that time expressing how he intended to correct his conduct, a statement that according to Flugence had to be written on the spot and was largely dictated by Walker.[46] (Tr. 439–447, 450–452).

Flugence also received a CAN which Feeney wrote and signed, detailing the reasons for the suspension and 90-day probationary period (GC Exh. 111). The CAN, which marks "insubordination" as the type of violation involved, has a narrative describing how Flugence was "released" by the retail client on September 10 before he completed the job, as well as describing the incident at the yard that Albertolle observed. Walker testified that he made the decision to suspend Flugence, on the basis that Flugence had abandoned the retail job on September 10, just as he had abandoned the job on August 21, as well as the incident in the yard. (Tr. 632–633, 1092–1096). Curiously, however, the CAN describes the retail job in question as a "*one way transfer*," which supports Flugence's testimony that he was told by Feeney that the job was exactly that, a *one-time* pick-up and delivery of passengers to their destination, as opposed to one involving continuing "loops" with repeated pick-ups and deliveries.[47] Simply put, the record

[44] The General Counsel argues that Flugence did not do any of the things Albertolle testified he observed, suggesting that Albertolle simply fabricated the story because of Respondent's animus toward Flugence. The problem with this argument is that Flugence confirmed that Albertolle confronted him the second he got off his bus, which belies Albertolle having concocted such false ploy in mere seconds. Moreover, Flugence had just returned from a retail run where he was admittedly surprised, if not shocked, to see his "nemesis," Stephan, whom he had repeatedly been assured would not be there. Accordingly, it is reasonable to infer that Flugence was very upset, likely believing that he had been lied to, and was still fuming when he returned to the yard, which would explain the aggressive driving Albertolle observed. Additionally, Flugence's silence in the face of Albertolle's accusations surely indicates a degree of guilt, since normal human behavior is to immediately deny a false accusation. Accordingly, I credit Albertolle. Whether Flugence's conduct warranted the discipline imposed is altogether a different issue.

[45] It isn't clear in the record who is "Mr. Jimmy" (as Flugence called him), but apparently he was a management official who worked with Walker.

[46] This statement was introduced in the record as R. Exh. 1.

[47] Compare the language of the September 16 CAN, for example, with that of the August 26 CAN for the August 21 incident (GC Exh. 112) which clearly describes the job as one involving "*continuous loops*," a job which Flugence admittedly did not complete, because of his wife's medical emergency. The fact that the September 10 assignment was a "one way transfer" is also confirmed in Joe Knox's email to Feeney on September 11 (GC Exh. 120/3).

strongly indicates that Flugence in fact completed his job on September 10, which was to pick up passengers *one time* and deliver them to their destination. Thus, I conclude that Walker's narrative that Flugence once again "abandoned" his job is a false one, suggesting an embellishment if not a fabrication in order to support the discipline imposed.[48]

On the following day, September 17, Flugence began his shift at 5 a.m., and had a couple of different assignments that morning, including filling in for a driver who failed to show up. Around mid-day, Flugence was driving out of the yard in his bus to his next assignment when he saw Walker near a white line painted on the pavement that says "Stop" inside the yard. Flugence stopped to complain to Walker that he had been working non-stop all day without a break. Walker replied that he would speak to Feeney about it. As Flugence started to drive away, Walker said to him "Next time I want you to come to a complete stop when you come to this point." Flugence testified that in fact he had stopped. Flugence continued to his next assignments, and later that afternoon, around 5 p.m., he received a call from Johnson asking him to return to the SF yard and report to the dispatch office. Flugence returned to the yard, and was told by dispatch to report to Walker's office. When he went there, Feeney was also in Walker's office. Walker told Flugence that he had been hearing all these things about him, about him speeding, his incident with Albertolle, and that he had seen him run a stop sign in the yard that afternoon. Walker then said "it's too much, we are going to have to terminate you, because I don't want to be the person to go and knock at your door and tell your wife that you're dead." Flugence protested that he had a safe driving record and no complaints from clients, to no avail. (Tr. 457–462).[49]

Walker testified that on September 17, he had just stepped out of the office into the yard when he saw a van "fly through the intersection," and then saw the van back up and saw Flugence was the driver. Walker confirmed that Flugence told him that he had been working all day without a break, and that he responded that he would look into it. He then told Flugence that he had just seen him run through the stop sign and asked him why, to which Flugence replied that he was running late. Walker testified that at the time he had no plans to discharge Flugence, but that the incident "just kept wearing on me" as the day progressed and when he saw "the big picture," meaning Flugence's recent conduct, he decided to terminate Flugence. Invited to further elaborate, Walker testified that he was concerned that Flugence's "reckless driving" could represent a menace to the community and to Respondent. He testified that as a former HR manager for UPS he had the difficult task to inform families when drivers had been killed, and that he did not want to have to inform Flugence's family of the same.

[48] An additional false narrative is using the term "insubordination" to describe Flugence's conduct, at least with respect to the retail job incident. Respondent thus admitted that Stephan was not a supervisor and had no real or apparent authority to direct Flugence's work. Even if Stephan had ordered Flugence to perform additional loops, Respondent has provided no valid explanation as to why Flugence was required to obey such directive. It should be noted that an earlier version of the September 16 CAN, produced under subpoena and introduced as GC Exh. 122, indicates that initially Respondent wanted to discharge Flugence at this time, but apparently thought better of it. Again, this suggests that Respondent was already planning to discharge Flugence, but wanted to build up the "paper trail" to further support this action, an action which as described below followed in short order.

[49] Flugence actually mentioned that his "H6" was excellent, which is the DOT record that all transit drivers must have. There is no evidence, for example, of Flugence having any traffic or safety violations on his record.

I found Walker's testimony to be exaggerated and self-serving, and his demeanor often betrayed a sense of resentment at being called to the stand—particularly by the General Counsel, who called him as an adverse witness. His testimony that Flugence "flew" through the intersection in the yard on September 17, for example, is clearly an exaggeration. Had Flugence done that, it is reasonable to infer that Walker's reaction would have been immediate, rather than first chatting about Flugence's schedule for the day. Moreover, having witnessed such "reckless" driving, as he later described it, it is reasonable to infer that Walker—or any reasonable manager—would have immediately relieved Flugence of his duties, rather than allowed him to continue to his assigned route.[50] For these reasons, as well as what I have previously discussed about the false narrative from Walker about the reasons for Flugence's prior suspensions, I find Walker's credibility wanting.[51]

It is thus undisputed that Respondent discharged Flugence on September 17. Further below, in the analysis section, I will discuss what the evidence shows with regard to whether disparate treatment of Flugence is present.

5. The suspension and re-assignment of Vargas to the SF yard

It is undisputed that Vargas was suspended on September 30, removed from his Cisco assignment, and re-assigned to the SF yard. How and why that came to be is at issue, but nonetheless much of what occurred and led to these events is also essentially undisputed.

Thus, as previously discussed, Respondent held a meeting for its drivers at Cisco a day or two prior to the September 30 election. The meeting was attended by Bauer, who led the meeting, as well as other managers. During the course of the meeting, there was a discussion about a certain flyer. There are two different versions of which exact flyer the discussion was about, but this is ultimately unimportant, because it is what occurred next that is significant.[52] During the discussion of the flyer in question, it is undisputed that Reyna Morales, one of the Cisco drivers, singled out Art Araiza as the "Union guy" and said he should explain the Union's

[50] I do not necessarily credit Flugence's testimony that he did stop, either. I conclude that the truth probably lies in the middle, that Flugence slowed down but did not come to a complete stop, as Walker suggested in Flugence's account of their conversation at the intersection. Between the two versions, however, Walker's is by far the more exaggerated and less credible.

[51] I would note that Feeney also testified about her participation in the meetings that preceded Flugence's suspensions and later his discharge, and that she is the person who wrote the narrative of the CANs at Walker's direction. Her description of the meetings is somewhat vague and generalized, however, but her account essentially mirrors Walker's narrative and does not add or detract anything of importance to the story.

[52] In one version, the flyer being discussed was one that had been placed on employees' cars by a unionized competitor employer soliciting Respondent's drivers to apply for jobs. In the other version, the flyer that was being discussed was prepared by Respondent, which discussed what kind of dues and fees employees would have to pay if the Union was voted in. I conclude that it is more likely that the flyer being discussed at the time was the one about union dues, since that subject would have been more likely to trigger Morales' questioning of Araiza. Either way, the exchange that followed is not in dispute.

views about the issue(s). In response, Vargas got up, called Morales a "stupid woman" and said he wasn't going to listen to this ("bullshit") anymore, and walked out.[53]

Vargas testified that the next day, early in the morning, he was at the Cisco parking doing the "pre-trip" check on his bus before starting his daily route. He was looking under the hood of his bus when, looking over his shoulder, he saw Morales drive by in her shuttle, on the other side of an island separating them. Suddenly, the shuttle stopped, backed up, and Morales got off the shuttle, crossed the island, and approached him. According to Vargas, Morales started waiving her arms and yelled at him in Spanish "what is wrong with you? What do you got against me?" Vargas told Morales to get back on her shuttle and go do her work. While this is going on, according to Vargas, another driver named Hermes is nearby, and he is gesturing at Hermes to witness what Morales is doing. At this point, Hermes approached Vargas, put his hand on his chest and told him that she "wasn't worth it." According to Vargas, however, he and Morales never got closer than 10 feet away from each other, so he wasn't sure why Hermes said that to him. Morales yelled at Vargas (in Spanish) that he wasn't man enough to kick her ass, and then started walked away, but came back and told Vargas "I'm calling HR." She then left.[54] (Tr. 279–289, 294–295, 339–342).

Vargas also related how he reported the incident to Scott Miklos, who interviewed him about what had occurred, and to whom he related the story as described above. He was told to wait for Bruce Neuhart, who was coming to Cisco to investigate. When he arrived at Cisco, Neuhart interviewed Vargas, who again repeated his story.[55] Neuhart then told Vargas that he was suspended for 2 days, pending further investigation.[56]

Morales confirmed much of Vargas' account of events as described above, including the fact that she drove by Vargas, stopped her shuttle, went into reverse, got out and approached Vargas.[57] The main difference in their accounts is that according to Morales, Vargas started cursing at her during their encounter, and told her "get out of here or I'll give you a trashing." She also estimated that they got to within 4 feet of each other, instead of 10 as Vargas had testified. Morales testified that she was afraid of Vargas because he came from "the war" (apparently referring to El Salvador) and that he doesn't like being spoken to. Because she was

[53] There are minor variations of how exactly Morales pointed out Araiza, and exactly what Vargas said in response. For example, in one version Vargas reportedly said "This is bullshit," which Vargas denied, but this is ultimately unimportant. What is undisputed is that Morales pointed Araiza out, and that Vargas publicly called her a stupid woman in response. These are the undisputed facts that set the stage for what followed. There was also some testimony that some of Respondent's officials may have stated at the time that Vargas' conduct was disrespectful toward Bauer, which may shed some light on the events that followed.

[54] It should be noted, Hermes apparently doesn't speak Spanish, according to testimony. According to Vargas, Hermes was a union supporter, but did not testify. Miklos' account of his interview with Vargas is essentially consistent with what Vargas testified, and also indicated that Hermes had reported essentially the same things—except that Hermes did not know what Vargas and Morales had said to each other in Spanish. Miklos also related that Morales had accused Vargas of being the aggressor. (Tr. 866–875).

[55] According to Vargas, Neuhart asked him if he had started this incident with Morales. Vargas said no, but Neuhart then suggested that Vargas had started it the night before, when he called Morales a stupid lady and disrespected Bauer.

[56] Vargas later clarified that he was paid half day for that day (Wednesday, September 30), and was suspended all day Thursday and Friday (Tr. 300; 324).

[57] She testified that when she was going by, Vargas gestured toward her, as if saying "what's up?"

afraid of Vargas, she called the dispatcher at SC (Elba Garcia) and then her supervisor, Myrna, whom she asked to call the police. The police came to Cisco and interviewed her for about 18 minutes. According to Morales, soon after she left Cisco she was recalled to SC by Elba, before she could pick passengers up. She went back to SC, where she waited for about 2 hours before she could meet with Neuhart, who interviewed her about the incident, along with Elba, who translated for her. Neuhart then informed her she was suspended for 3 days. (Tr. 1015–1022; 1036–1037).

Miklos testified that on the morning of September 30, in the wake of the incident between Vargas and Morales and the ensuing police visit, he was informed by Bruce Nelson, Cisco's liaison with Respondent, that both employees should be removed from the account. (Tr. 870; 876). Neuhart testified, on the other hand, that he believed that it was Bauer and/or Walker who had communicated with Cisco. (Tr. 659–651) In any event, it is essentially undisputed that Vargas and Morales were removed from Cisco at its request.[58]

Vargas testified that on Friday (October 2), he received a call from dispatch at SC asking him to come in to see Neuhart. Because he was having trouble with his car, however, Vargas did not make it to SC until about an hour and a half later. While he waited in SC to meet with Neuhart, he saw Morales and Elba Garcia meeting with Neuhart. After the meeting ended, he testified he heard Neuhart instruct Elba to give Morales the keys to a shuttle. Vargas then met with Neuhart and Walker. Neuhart informed Vargas that after further investigation they could not determine whose fault the September 30 incident had been, but that in any event both he and Morales had been suspended for 3 days and that both were out of Cisco, at its request. Neuhart told Vargas that they were re-assigning him to a new account out of the SF yard. Vargas said that he was being punished for something he did not do, and Neuhart replied that this was where he was going because they had to keep him and Morales separated. Vargas asked if he would be provided with a company car to drive to SF, and Neuhart said they could not do that. Vargas protested that he knew that Ernest Lewis drove a company vehicle from SF to Cisco, where he works, and another employee, Sandy, who drove a company vehicle from SC to SF where she works. Neuhart said he did not know anything about that, as did Walker.[59] Vargas was scheduled to start in SF on Monday October 5, but did not do so until the next day, because he had car trouble. About a week later, Vargas met with Maureen Feeney and Walker in his office. Walker told Vargas that the investigation had not determined who was at fault—he said it was a "he said, she said" type situation, and that he would remain in SF until an opening occurred in SC. Walker then handed Vargas a CAN describing what had occurred between him and Morales at Cisco, and warning about any future similar conduct. (Tr. 300–309; GC Exh. 107).

[58] I use the term "essentially undisputed" because in its brief, the General Counsel insinuates that the variance between Miklos' and Neuhart's testimony as to who received the marching orders from Cisco means that this never happened. If the General Counsel truly believes such was the case, it had but one course of action to follow: allege in its complaint that Vargas' removal from the Cisco account was unlawful. The fact that it did not do so plainly signifies either that it learned during the investigation that Cisco had indeed directed the employees' removal, or that it feared the allegation would be completely undermined in less than 20–30 seconds of testimony by a Cisco official. Simply put, the General Counsel should not raise silly arguments it is unwilling to back up with pleadings.

[59] Lewis confirmed that he drove a company vehicle from SF to Cisco every day, but that this stopped shortly after the election. No further evidence was introduced as to the alleged employee Sandy.

Neuhart's testimony about his meetings with Vargas and Morales—as well as the multiple employee meetings he attended—was vague and generalized for the most part, with many of his answers preceded by the phrase "I don't recall," which appears multiple times throughout his testimony.[60] Regarding his meeting(s) with Vargas, Neuhart testified that he met with him first at Cisco, along with Miklos, although he did not review the facts, because Miklos had already done that with Vargas. He told Vargas he would review the case with Miklos and Walker, and would get back to him, and in the meantime he was told to go home. Neuhart also met with Morales at the SC yard later, in order to ascertain the facts and her state of mind. Neuhart said the meeting was very short, and that he did not recall what was said, partly because they needed a translator and he had difficulty understanding Morales. He further discussed the matter with Walker, the HD director, and they decided to suspend both Vargas and Morales pending further investigation. As previously discussed, Neuhart testified that he believed Bauer and/or Walker communicated with Cisco, which informed them it wanted both drivers removed from its account. (Tr. 654–661; 670–671).

In light of these circumstances, Neuhart testified, he had discussions with Charles Spear (the SC operations manager), Joe Knox and SF Operations manager Maureen Feeney regarding where to assign Vargas and Morales to. Although he claimed he did not recall all the facts, Neuhart testified that the final decision as to where to assign Vargas and Morales was made by Spear and Feeney. He also testified that he was made aware of some concerns by Vargas regarding the time needed to get to SF, as well as the availability for split shifts, but did not recall specifically what those concerns were. Neuhart did not address his meeting in SC with Vargas on October 2, when Vargas testified Neuhart informed him of the decision to assign him to the SF yard. (Tr. 662–663; 671–672).

As reflected above, I found Neuhart's testimony to be very vague and non-committal. It is difficult to determine whether his vagueness was the product of poor recollection or intentional obfuscation, but the end result is the same: I did not find his testimony helpful or clarifying, and give it little weight. Thus, to the extent that his testimony conflicts with that of Vargas,' I credit the latter.

Feeney testified that following the incident at Cisco, she was asked (she did not say by whom) what routes were available to assign to Vargas and Morales. According to Feeney, only two commuter routes were available for assignment at the time: one was a "straight-shift" route out of SF; the other, a "split-shift" route out of SC. The SF route was a new one, just acquired, whereas the SC route was an established one that up to that point was performed by drivers who were on stand-by status. Feeney testified that Neuhart asked her to speak to Vargas about which route he would prefer. She accordingly called Vargas, who said he would prefer the straight-shift route.[61] Feeney admitted, however, that she did not tell Vargas that the straight-shift route

[60] Neuhart, who is no longer employed by Respondent, testified via video teleconference from Phoenix, where he currently resides, by mutual agreement of the parties.

[61] Vargas testified that he had previously expressed his preference for straight-shift route to management (Tr. 321–322). The General Counsel, in its brief, points out that Vargas "did not corroborate" Feeney's testimony that she asked him for his preference. This is disingenuous; there was no need for Vargas to "corroborate" Feeney's testimony, since it was testimony adverse to his interest. Rather, he needed to *rebut* her testimony if not true. Vargas did not rebut Feeney's testimony—because the General Counsel never put him back on the stand to do so. Accordingly, I conclude that Vargas told Feeney he preferred the straight-shift route.

was out of SF, and apparently Vargas did not ask. Feeney also testified that Morales expressed a preference for a split-shift route, because she liked to work retail routes in between shifts—as she continued to do in SC when she was re-assigned there. Accordingly, Vargas was assigned to the SF (straight-shift) route, whereas Morales was assigned to the SC yard for the split-shift route. (Tr. 722–723; 734–735).[62]

According to payroll records and Morales' testimony, however, Feeney's narrative that Morales was assigned to a split-shift route in SC is not entirely accurate. Thus, a payroll record dated Friday, October 2 shows that Morales worked on a split-shift commuter route all day, the Menlo Business Park BART Shuttle route.[63] (GC Exh. 118/1). Thereafter, starting on Monday October 5, and for several weeks thereafter, payroll records show she was on "stand-by" status, with no assigned route.[64] On November 16, she received a commuter assignment, the "Hudson Pacific" account, but the payroll records end on November 17 (GC Exh 118). According to Morales' testimony, however, it appears that she may have been placed back on "stand-by" status for a while until being assigned to the "South Pacific" route, which she had been driving for about 2 months at the time of her testimony in February. (Tr. 1041).

Finally, payroll records show that from July to September, prior to being removed from Cisco, Vargas averaged about 105 hours of work per pay period, while Morales averaged about the same. After their removal from Cisco, through December, Vargas, now working out of SF, averaged between 71 and 75 hours per pay period (initially about 71, then about 75), while Morales, working out of SC, averaged about 96 hours of work per pay period during the same time period. (GC Exhs..115; 116). It is undisputed that Vargas' commuting distance increased significantly after being assigned to SF, over 50 miles in each direction.

III. ANALYSIS AND DISCUSSION

A. Evidence of Animus Toward the Union or Its Supporters

As detailed above, from August through September, I concluded that Respondent engaged in certain conduct, mostly in the form of statements to its employees, at its three facilities in SF, SC and Cisco. Most of these statements were made by Bauer, Respondent's highest official, which carries particular weight when evaluating their significance and potential impact on employees. Specifically, I credited testimony that Bauer made the following statements:

- That he had built this company over the years and did not want the Union coming in and taking over his business or telling him how to run it;

[62] Feeney also explained that some drivers prefer split-shifts not only because such shifts allow them to earn additional income by doing retail runs in between shifts, but because they can earn an extra 50 cents per hour if the break between shifts is longer than 4 hours (Tr. 723–725).

[63] This is notable, since Vargas was still suspended on that day and until Monday October 5, when he was told to report to SF. This apparent discrepancy in their suspension time was never explained.

[64] According to testimony by Flugence and Feeney, drivers on stand-by status do not have assigned routes. They wait in the yard until they are assigned a route, sometimes as a substitute or back-up driver, and get paid 8 hours even if they do not get a route assignment on any given day. They may be given in-yard assignments such as fueling or parking buses. The routes they drive could be retail, commuter, or both.

- That drivers who did not like it there, or which preferred the benefits offered by a unionized competitor, could go (work) there or elsewhere;
- That drivers (who supported the Union) were ungrateful, or disloyal;
- That he felt betrayed by the employees' union support or activities;
- That he asked "what else can I do for you guys?"
- That if the Union came in, commuter drivers would not be able to drive retail routes and earn extra money;
- That if the Union came in he would not be able to do "extra things" such as having parties and picnics for the drivers.
- That supporting the Union would be futile.

Additionally, I also found that Respondent solicited grievances, interrogated employees about their union activity, and granted gifts or benefits in the advent of Union organizing. As discussed above, in light of my approval of the Union's withdrawal of the charge in Case 20–CA–161534, I reach no conclusions of law nor make any findings as to whether this conduct violated the Act. As discussed by the Board in *Brink's, Inc.*, supra., and cases cited therein, however, I can determine whether such conduct reflects animus and possible motivation regarding other conduct alleged in the (surviving) pleadings. I conclude that the conduct described above represents strong evidence of animus toward the Union and employees who supported it.

B. The Suspension(s) and Discharge of Flugence[65]

It is undisputed that Respondent suspended Flugence for 3 days twice, first on or about August 26, again on or about September 11, and then discharged him on or about September 17. The General Counsel avers that Respondent suspended and discharged Flugence in retaliation for Flugence having provided the Board with evidence against Respondent in case 20–CA–151225, and/or because of his activities or support for the Union, in violation of Section 8(a)(4), (3) and (1) of the Act. Respondent, on the other hand, contends that it lawfully suspended and eventually discharged Flugence for misconduct.

These allegations must be evaluated pursuant to the Board's analysis discussed in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management, Inc.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must initially demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor for an employer's adverse employment action.[66] The General Counsel initially meets its burden under this test by showing that the employee was engaged in protected activity, the employer had knowledge of such activity, and the employer had animus. Once the General Counsel has met these criteria, the burden shifts to the employer to show that it would have undertaken the same adverse action even in the absence of protected activity. *Michigan State Employees Association*, 364 NLRB No. 65, slip op. at 5, fn. 17 (2016). The employer cannot carry this burden merely by showing

[65] These allegations correspond to paragraph 12 of Complaint I.

[66] Needless to say, protected activity also includes participating in the Board's processes or providing the Board with evidence. The *Wright Line* analysis is equally applicable to violations of Section 8(a) (4) of the Act. *Taylor & Gaskin, Inc.*, 277 NLRB 563 (1985).

that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Dentech Corp.,* 294 NLRB 924, 956 (1989).

With regard to Flugence's protected activity, there is no question that he was so engaged. He provided two affidavits in support of a Board charge filed by the Union against Respondent, and also attended at least a couple of meetings held between union officials and a number of Respondent's employees during the organizing campaign. Regarding Respondent's knowledge of Flugence's protected activity, while there is no direct evidence of Respondent having knowledge of Flugence's attendance at the meetings with the Union, Respondent knew, as of August 21, that he had provided two affidavits to the Board in support of the Union's charge in case 20–CA–151225. On that day, the General Counsel served Respondent with copies of Flugence's affidavits that it had filed with the U.S. District Court in support of a motion for injunctive relief under Section 10(j) of the Act. As discussed in the Background Facts section above, these facts are undisputed. Finally, with regard to animus, there is abundant evidence of animus in the numerous statements and other conduct by Bauer and other Respondent officials, as detailed above. These include solicitation of grievances with implied promises to resolve them; threats about loss of work or wages; granting of benefits; equating employee support for the Union to disloyalty, betrayal, or ungratefulness; suggesting the futility of supporting the Union; and interrogations. Moreover, the timing of Flugence's first suspension, only 5 days after Respondent had received copies of his affidavits, by itself creates the inference of animus. Accordingly, I conclude that the General Counsel has met its initial burden under *Wright Line*.[67]

In view of the above, the burden shifts to Respondent to show, by the preponderance of the evidence, that it would have suspended and discharged Flugence even in the absence of his protected activity. For the following reasons, I conclude that Respondent did not meet its burden. As described in the Facts section, Flugence was suspended for 3 days on August 26 for "abandoning" his work and "insubordination," according to the Corrective Action Notice (CAN) he received. Both of these terms, at best, are inaccurate and grossly exaggerated; at worst, they are simply false, a narrative unsupported by the facts. As described, after completing a couple of client drop offs, he received a call from his wife, who was having a seizure. He attempted to call his road supervisor, but could not get hold of him, and then departed for the SF yard. On his way there he was contacted by dispatch and then his road supervisor, and he explained the family

[67] Respondent argues that there is no evidence that Walker, who decided to suspend and ultimately discharge Flugence—and who testified he was never aware of the affidavits filed in district court and served on Respondent—had knowledge of Flugence's protected activity. This strains credulity. An injunctive relief action in district court is one of the most unusual and severe actions the General Counsel can undertake against an employer, a move that can reasonably be assumed to be noticed and raise alarms throughout the upper echelons of management. It is reasonable to assume that such action, and its supporting evidence, came to the immediate attention of Bauer and other high-level managers such as HR Director Walker. I note the Board has imputed knowledge to the employer as a whole when a supervisor has knowledge of an alleged discriminatee's protected activity. *Red Line Transfer & Storage Co.*, 204 NLRB 116 (1973). The inference of such awareness only gets stronger if knowledge starts at the top. Moreover, the fact that Flugence was the only one of seven employees who provided affidavits to the Board to be disciplined does not diminish the impact that his activity likely had on Respondent. It becomes evident upon reading the affidavits that Flugence opposed the "sweetheart" in-house union with the most ardor, calling out its self-proclaimed leader, Murdock, as a traitor and Judas, in the presence of others. If, as is readily inferred, Murdock conspired with Respondent to form this sweetheart union, it can safely be assumed that Flugence's passionate opposition came to Respondent's attention though his affidavits, if not earlier.

emergency. When he arrived at the SF yard to return his bus, he again checked in with the dispatch office and notified them that he had to go home to take his wife to the hospital, where she was kept overnight. Yet the CAN states he "abandoned" his job and that he failed to notify anyone—which is simply not true.[68]

The discipline imposed on Flugence in the above circumstances can only be called draconian. Employers, of course, are free to be as draconian in their disciplinary standards as they wish, for there is no law prohibiting such practice—and the Board should not substitute its judgment on disciplinary matters for that of employers, as Respondent correctly points out. When unreasonably harsh discipline is imposed in unequal or disparate ways, however, the specter of unlawful discrimination is raised, which is what has occurred here. First, it needs to be noted that Walker, Respondent's HD Director who decided to discipline Flugence, testified that Respondent employs a progressive disciplinary system; I take him at his word. Given such testimony, it is difficult to understand why Flugence, who had no record of any discipline previously—and who had an excellent work record evaluation by Johnson—was suspended for 3 days for his *first* offense. Respondent proffered no explanation for this discrepancy, other than to state, as Walker did, that he thought the discipline was justified. Second, as the General Counsel persuasively noted, disciplinary records produced by Respondent under subpoena show other employees who had committed similar or worse offenses were either not disciplined or received much milder discipline. For example, driver Zorana Breed has received *multiple* write-ups for not showing up for assigned work and not calling in ("no call, no showed"), and there is no evidence that she ever received any type of discipline, other than the write-ups (GC Exhs. 13(a)–(e)). Driver Shaquane Burdette has received at least one write-up for "job abandonment," without any evidence of additional discipline (GC Exh 14(d)).[69] Driver Caurista Titus has received multiple write-ups for no call-no shows, without any evidence of additional discipline (GC Exhs. 86(c)–(f)). Yet, none of these drivers appear to have had as reasonable justification for their conduct as Flugence did—having to take his spouse to the hospital.

The above evidence strongly suggests that Flugence was treated differently than other drivers and that he had a target on his back, only 5 days after his affidavits were served on Respondent. It is also plain that Respondent was determined to quickly build up a paper record against him, in order to justify increasingly harsher discipline, as the events that followed show. Thus, on September 10, Flugence agreed to do a "one-way transfer" retail route during his mid-day break between split shifts, which involved a one-time pick-up of passengers and one-time drop-off of them, and then returning to base. Before he accepted the job, he received repeated assurances from the dispatcher, Feeney, that Fadi Stephan, a salesperson with whom Flugence did not get along, would not be involved with the job. Flugence became upset when he arrived to pick up his passengers and saw Stephan there directing the operation, but he *completed the job* and delivered his passengers.[70] When he returned to the yard in his bus, Flugence was accused

[68] The term "abandonment" suggests leaving work without cause and without notification, criteria that doesn't fit Flugence's actions. Even if "abandonment" is defined in the strict sense—meaning the employee left with or without good cause—Respondent's disparate treatment of others in similar situations suggest this is a ruse, as discussed below. Likewise, it is difficult to understand how Flugence was insubordinate in these circumstances.

[69] She also received a write-up for untimely performance during a route (GC Exh. 14(a)).

[70] As I previously found, Respondent's own documents show that this was a one-way transfer, not a "continuous loop" involving multiple pick-ups. Accordingly, I found that the language in the CAN Flugence later received, as discussed below, contained a false narrative, indicating that he had abandoned his job.

by supervisor Albertolle of driving too fast inside the yard and screeching his tires. As described earlier, Flugence remained silent when confronted by Albertolle.

Several days later, on September 16, Respondent suspended Flugence for 3 days *and* placed him on a 90-day probation period, which Respondent admitted was unprecedented—no one had been placed on a probationary period before. The CAN prepared for the occasion accuses Flugence of "job abandonment," insubordination and driving in an unsafe manner inside the yard. As discussed above, I concluded that the accusation of job abandonment was simply false, a false narrative that I find was fabricated only to build up the record against Flugence—which supports the inference of animus and false pretenses. As I previously discussed, I concluded that Flugence was likely upset when he drove into the yard because he believed he had been misled—or lied to—about Stephan being on the job, so it is likely that he drove in the fashion described by Albertolle. He also remained silent in the face of Albertolle's accusation, which could be interpreted as a form of insubordination. Flugence was thus not completely innocent of misconduct in these circumstances—as suggested by the General Counsel. The question then becomes whether the discipline imposed under the circumstances was justified and supported by past practice. As with the prior suspension, the answer is that it was not.

First, the September 16 suspension and probationary period relied on the prior August 26 suspension as justification for the harsher discipline. As discussed above, the August 26 suspension was disparate in nature and discriminatorily imposed, and thus it is unlawful to base harsher discipline upon a foundation of unlawful prior discipline. This reason alone is sufficient to invalidate the justification of the September 26 discipline, yet there are additional reasons. As discussed above, the September 16 CAN contained the false accusation of job abandonment, which makes the discipline pretextual in nature and taints its validity. Finally, as with the prior suspension, there is evidence of disparate treatment, as Respondent imposed no discipline or milder discipline on drivers who engaged in similar conduct. For example, subpoenaed disciplinary records show that drivers Faridi (GC Exh. 8(a)); Goerge (GC Exh. 33); and Titus (GC Exh 86(d)), have received write-ups for insubordination—but nothing more. Likewise, with regard to "unsafe driving," the record shows that drivers have been engaged in accidents causing costly damage—and even hitting a pedestrian—without incurring more than a write-up or verbal warning. See, for example, drivers Afewerk (GC Exhs. 4(a); (b)); Casados (GC Exh. 15(a)); and Ibrahim (GC Exh 44). By comparison, Flugence, who had a perfect driving and safety record, was observed going 15–20 mph in a 10 mph zone inside the SF yard, and screeching his tires—yet was suspended for 3 days (already served) and placed in an unprecedented probationary period. The record clearly shows disparate treatment and pretextual discipline, further enhancing the already strong evidence of discriminatory motivation.

Finally, Walker discharged Flugence the very next day, September 17, after watching Flugence not come to a complete stop at a stop sign inside the SF yard. Curiously, Walker did not immediately discharge Flugence after watching such ostensibly unsafe conduct, but rather allowed Flugence to continue his routes, delivering passengers to their destinations. Later that day, after thinking about it for a while, Walker decided to discharge Flugence—for his own good, if Walker is to be believed (he is not). Walker, I conclude, saw his opportunity to move against Flugence after a minor infraction, based on foundation of unlawful prior discipline, in

order to finish the job Respondent had started on August 26 of building up a pretextual disciplinary record against Flugence.[71]

In sum, Respondent has failed to meet is burden to show that it would have discharged Flugence even in the absence of protected activity. Respondent's explanations for the rapid escalation of discipline imposed on Flugence in short order reeks of pretext, and fails to establish that it was valid or justified. Accordingly, I conclude that the suspensions and eventual discharge of Flugence violated Section 8(a)(4), (3) and (1) of the Act.

C. The Suspension and Re-Assignment of Vargas[72]

It is undisputed, as discussed in the Facts section, that Vargas was removed from the Cisco account and suspended for 3 days starting on September 30, and that he was thereafter re-assigned to work at the SF yard. What is in dispute is whether Vargas' suspension was warranted and lawful, and whether his transfer to SF represented a more onerous work assignment motivated by animus on account of his protected activity.[73] The General Counsel argues that Vargas' re-assignment in SF was unlawful because it resulted in a far longer commute and in fewer work hours. Respondent argues that Vargas and Morales, whose confrontation resulted in their removal from the Cisco account, were both disciplined equally for the incident, and that the assignment of Vargas to SF was based on his expressed preference for a "straight-shift" route, which was only available in SF.

Although the General Counsel is not explicit regarding its theory of a violation on its brief, it suggests that a *Wright Line* analysis is also applicable to the allegations regarding Vargas. I agree that such analysis is proper in this factual situation, although there are variables at play that makes this analysis more complex. Regarding the General Counsel's initial burden under *Wright Line*, there is abundant evidence that Vargas was engaged in protected activity. He attended numerous meetings with the Union and fellow drivers, and was responsible for soliciting and collecting authorization cards on behalf of the Union. Moreover, he publicly spoke during mandatory meetings held by Respondent in a manner that identified him as a union supporter. Thus, he challenged Bauer during a couple of these meetings, pointing out that Respondent had lost accounts to "union" competitors, and urging Bauer to "permit" a union vote.[74] Indeed, his dispute with Morales had its genesis at a meeting held by Bauer at Cisco, during which Vargas called Morales a "stupid woman" after she questioned the need for a union and exposed Araiza as the "Union guy." Accordingly, the evidence indicates that Respondent was aware of Vargas' union sentiments. Finally, as discussed previously, there is abundant evidence of union animus on the part of Respondent. Thus, it would appear that the General Counsel has met its initial burden of proof under *Wright Line*, although, as discussed below, there is an issue as to whether a truly "adverse" employment action was taken in this case, and if

[71] Flugence's accelerated discipline and discharge is also suspect in light of Bauer's pronouncement that Respondent is short of drivers and is always seeking to hire additional ones (Tr. 968).

[72] These allegations correspond to paragraphs 5, 6, and 7 of Complaint II.

[73] Curiously, although paragraph 5(a) of Complaint II alleges that Vargas was suspended on September 30, the General Counsel's brief completely ignores the suspension, and only argues that his reassignment to SF was more onerous and unlawfully motivated.

[74] Whether or not Vargas was correct about his assertions with regards to these accounts is ultimately immaterial—what matters is that he publicly asserted such to be the case.

so, whether Respondent has shown it would have taken the same action in the absence of protected activity.

As discussed earlier, both Vargas and Morales were removed from Cisco as the result of Cisco's directive, so there is clearly nothing unlawful about such action, even if it can be considered adverse. The record also shows that Respondent temporarily suspended both Vargas and Morales soon after their confrontation at Cisco, pending an investigation as to whose "fault" their confrontation had been. It would thus appear that at least initially, Respondent met its burden to show that it would have suspended Vargas irrespective of his protected activity, since another employee who had not been so engaged—and indeed appeared to be opposed to the Union—was also suspended.[75] Thus, if any disparate and thus unlawful treatment occurred as argued by the General Counsel, we must examine carefully what happened thereafter to determine whether that indeed occurred.

The record shows that both Vargas and Morales were suspended for the remainder of the day on Wednesday September 30, the day of the incident at Cisco, as well as all day Thursday, October 1. Contrary to the General Counsel, who alleges that Vargas' initial suspension was unlawful from its inception, I conclude that the fact that Morales was also suspended at the same time dissipates any inference of an unlawful motive. After all, both employees were indisputably involved in an altercation at the Cisco facility, with no clear evidence of who was to blame, an incident which resulted in their removal from the Cisco account at the client's request.

On Friday October 2, however, their treatment by Respondent appears to diverge. Payroll records thus show that Morales worked all day long that day, driving the Menlo Park BART Shuttle (split-shift) route (GC Exh 118/1), whereas Vargas remained suspended. This evidence directly contradicts Respondent's assertion on brief that Respondent "suspended both employees for three days," which goes to the heart of Respondent's "equal treatment" defense. On that day, October 2, Respondent called Vargas to come to SC to meet with Neuhart, who informed Vargas when he arrived that its investigation of the incident at Cisco had failed to reveal who was at "fault," and that therefore both he and Morales were suspended for 3 days and would be re-assigned.[76] Respondent has failed to explain or proffer evidence as to why Morales was already working again by Friday October 2, while Vargas remained suspended, in light of its conclusion that neither of them was at fault for the incident at Cisco—or that they were both equally at fault. This disparate treatment suggests animus and pretext, and creates a rift in Respondent's defense.

[75] In its brief the General Counsel again barks up the wrong tree, pointing out that Vargas was suspended quickly and first, while Morales was allowed to continue working before finally being called in into SC, and insinuating this shows disparate treatment. A far simpler explanation is that while Vargas was stationary at Cisco and was reached quickly, Morales had already left the premises and was "on the road" before she could be re-called to the SC yard. Moreover, Vargas was paid for half a day that day, as was apparently Morales, and thus their treatment was equal.

[76] Vargas also testified that on that day he heard Neuhart inform the dispatcher to give Morales the keys to a shuttle, something that appears to be confirmed by the aforementioned payroll record.

On October 2, Neuhart also informed Vargas that he was being re-assigned to the SF yard as of Monday, October 5, adding that he and Morales needed to be "separated."[77] Vargas immediately protested, alleging that he was being punished by being assigned to a distant location. While Respondent's decision to separate Vargas and Morales appears reasonable in light of their history, an issue exists as to why Vargas should bear the burden of such separation policy by being assigned to a distant yard that increased his commute by more than 100 miles round-trip. Respondent's explanation is that Vargas had expressed a preference for "straight-shift" routes, which is true, and that Vargas confirmed to Feeney (in a phone conversation) that he indeed wanted such route—a claim Vargas never rebutted. Yet Feeney admitted that she never informed Vargas that such route was available only in SF, which might have made a big difference in his choice, an omission that I find disingenuous at best, and which possibly reflects calculation. Moreover, Respondent claims that since the only straight-shift route existed in SF, while the only split-shift route which Morales preferred existed in SC, Vargas and Morales were assigned accordingly. Yet, this explanation is not entirely accurate, either. Payroll records again show that while Morales worked a split-shift route on October 2 (while Vargas remained suspended), she was then placed on "stand-by" status for several weeks thereafter, starting on Monday, October 5. Stand-by status, as previously discussed, means that the driver is on the yard awaiting any given assignment—but is guaranteed 8 hours of pay whether or not a route is actually driven on any given day. Accordingly, in reality, there was no route to assign to Morales, who by virtue of her stand-by status was guaranteed a steady 8 hours of pay per day. Vargas, on the other hand, not only had to commute more than a 100 additional miles per day when compared to his prior assignment at Cisco, but was assigned a route in which he worked fewer hours per week than Morales, and which resulted in lower earnings. There is no telling, of course, what choice Vargas would have made had he been presented with these facts. This, however, is the whole point—he was not truly offered a choice, given the obscurity of Respondent's decision-making. There can be no question that assigning Vargas to SF has been by far the more onerous choice, when compared to Morales' assignment. Accordingly, such assignment can be deemed an adverse employment action.

The ultimate question is then whether given the above facts, Respondent has established that it acted with true and sincere equanimity in this matter, and thus showed that Vargas would have been treated in the same manner whether or not he had engaged in protected activity. I conclude that it has not. The above record shows a disparity of treatment between him and Morales, which not only reflects animus, but which punctures a large hole in Respondent's affirmative defense. As discussed above, this disparate treatment first emerges on October 2, when Morales is placed back to work while Vargas lingers on suspension, and continues to manifest itself in the manner in which Respondent went about choosing where to reassign Vargas and Morales. Accordingly, I conclude that Respondent has not met its burden under *Wright Line* to show that it would have treated Vargas in the same manner absent his protected activity.

[77] This intent to separate Vargas and Morales was confirmed by Neuhart in his testimony as well as Walker in his.

In light of the above, I find that Respondent violated section 8(a)(3) and (1) of the Act by suspending Vargas on October 2, and by re-assigning him to the SF yard.[78]

CONCLUSIONS OF LAW

1. Bauer's Intelligent Transportation, Inc. (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local 665, International Brotherhood of Teamsters (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1), (3), and (4) of the Act by suspending its employee Roy Flugence on or about August 15 and September 11, 2015, and by discharging him on or about September 17, 2015.

4. Respondent violated Section 8(a)(1) and(3) of the Act by suspending its employee Guillermo Vargas on October 2, 2015, and by transferring him to its San Francisco location on or about October 5, 2015.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy for the Section 8(a)(1), (3), and (4) violations I have found is an order requiring Respondent to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, the Respondent will be required to cease and desist from: suspending or discharging employees because they have supported a labor organization or because they have provided evidence to or assisted the Board during the course of an investigation; and from assigning employees to less desirable or distant work locations because they have supported a labor organization.

Having found that Respondent unlawfully discharged Roy Flugence, Respondent must offer him reinstatement to his former job or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed. The Respondent shall make Roy Flugence whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Flugence for search-for-work and

[78] It should be noted that on November 8, 2016 the General Counsel, Respondent and the Union stipulated that on March 1, 2016 Respondent transferred Vargas to its SC facility, which is much closer to his former work site at Cisco, and to his home.

interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Flugence for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 20 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Respondent shall also be required to remove from its files any references to the unlawful suspensions and discharge of Flugence and to notify him in writing that this has been done and that the suspensions and discharge will not be used against him in any way.

Having found that that Respondent unlawfully transferred Guillermo Vargas to the San Francisco yard, where he worked until March 1, 2016, Respondent shall make Vargas whole for any loss of income he suffered or additional expenses he incurred as a result of the discrimination against him. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Vargas for the adverse tax consequences, if any, of receiving a lump sum backpay award, and in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, file with the Regional Director for Region 20 a report allocating backpay to the appropriate calendar year. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Respondent shall also be required to remove from its files any references to the unlawful suspension of Vargas and to notify him in writing that this has been done and that the suspension will not be used against him in any way.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 2015. When the notice is issued to the Employer, it

shall sign it or otherwise notify Region 20 of the Board what action it will take with respect to this decision.

Accordingly, based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[79]

ORDER

Respondent, Bauer's Intelligent Transportation, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Suspending and/or discharging employees because they have supported a labor organization or because they have provided evidence to or assisted the Board during the course of an investigation;

(b) Assigning employees to less desirable or distant work locations because they have supported a labor organization.

(c) In any other like or related manner interfering with, restraining, or coercing employees in their exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Flugence full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Flugence and Vargas whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at all its facilities in San Francisco and Santa Clara, California, where notices to employees are customarily posted, copies

[79] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

of the attached notice marked "Appendix."[80] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 2015.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 20, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., November 25, 2016

Ariel L. Sotolongo
Administrative Law Judge

[80] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities

In recognition of these rights, we hereby notify employees that:

WE WILL NOT suspend, discharge or otherwise discriminate against you because you have supported Teamsters Local 665, International Brotherhood of Teamsters ("Union") or provided evidence or assistance to the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Roy Flugence full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Roy Flugence whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL make Guillermo Vargas whole for any loss of earnings and other benefits suffered as a result of our unlawful suspension and transfer to the San Francisco yard, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions, discharges, or transfers issued to Roy Flugence or Guillermo Vargas and **WE WILL**, within 3 days thereafter, notify each of them in writing that this has been done and that the suspension(s), discharge(s), and transfer(s) will not be used against them in any way.

BAUER'S INTELLIGENT TRANSPORTATION, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it

investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400, San Francisco, CA 94103–1735
(415) 356–5130, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-160321 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356–5183.